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NO. 738

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court
For the Western District of Missouri
Central Division

JURIEDICTIONAL STATEMENT.

NORMAN H. ANDERSON
Attorney General of Missouri
J. GORDON SIDDENS
Assistant Attorney General

THOMAS J. DOWNEY
Assistant Attorney General
Box 899
Supreme Court Building
Jefferson City, Missouri
Attorneys for Appellants.

KELLY PRESS, INC., 201 South Eighth Street, Columbia, Missouri

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO.————

JAMES C. KIRKPATRICK, et al.,
Appellants,

vs.

PAUL W. PREISLER, et al.,
Appellees.

On Appeal from the United States District Court For the Western District of Missouri General Division

JURISDICTIONAL STATEMENT.

PREAMBLE.

Appellants' appeal from the Judgment of the United States District Court for the Western District of Missouri, Central Division, entered on August 5, 1966, decreeing that the 1965 Missouri Congressional Redistricting Act is unconstitutional and void. The Judgment was entered by a three-judge court. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW.

The Judgment of the Court and the opinion appealed from are not yet reported. The Judgment and Decree appealed from is attached hereto as appendix A. The Findings of Fact

and Conclusions of Law, constituting the opinion appealed from, is attached hereto as appendix B. The Judgment and opinion appealed from is a sequel to **Preisler v. Secretary of State of Missouri**, W.D. Mo. 1965, 238 F. Supp. 187, decided January 4, 1965.

JURISDICTION.

This suit involves the constitutionality of a State statute under Article I, Section 2 of the Constitution of the United States and was required to be adjudicated by a three-judge court under Sections 2281 and 2284 of Title 28, United States Code. The Judgment of the District Court, declaring the State statute to be unconstitutional and permanently enjoining appellants from performing duties thereunder in the years 1968, 1970 and thereafter, was entered on August 5, 1966, and Notice of Appeal was filed in that Court on September 1, 1966. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. The jurisdiction of the Supreme Court to review the Judgment on direct appeal in this case is sustained by **Wesberry v. Sanders**, 374 U.S. 802. The Judgment and Decree appealed from found that the 1965 Missouri Congressional Redistricting Act, Sections 128.202 to 128.305, Missouri Revised Statutes, Cumulative Supplement 1965, pages 261 and 262, does not comply with Article I, Section 2, of the Constitution of the United States and is, therefore, unconstitutional and void. The 1965 Missouri Congressional Redistricting Act is attached hereto as appendix C.

QUESTIONS PRESENTED.

1.

The opinion, decision, and judgment appealed from is in conflict with **Wesberry v. Sanders**, 376 U.S. 1 (1964), as supplemented and complemented by **Reynolds v. Sims**, 377 U.S. 533 (1964), in that the court rejected as inapplicable to

congressional districting schemes the principle of substantial equality of population among the various districts.

2.

The opinion, decision, and judgment appealed from is in conflict with numerous prior decisions of United States District Courts in other jurisdictions rendered in regard to the constitutional validity of congressional districts, viz, **Drum v. Seawell**, M.D. N. Car. (1965), 249 F. Supp. 877, affirmed 383 U.S. 831; **Bush v. Martin**, S.D. Tex. (1966), 251 F. Supp. 484; **Moore v. Moore**, S.D. Ala. (1965), 246 F. Supp. 578; **Grills v. Branigin**, S.D. Ind. (1966), 255 F. Supp. 155; and **Kirby v. Illinois State Electoral Board**, 251 F. Supp. 909 (1965). The cases in conflict follow the principle that congressional districts are constitutionally valid if there is substantial equality of population among the various districts. The cases in conflict apply certain mathematical formulas in regard to relative population disparities. These principles and guidelines are rejected by the opinion, decision, and judgment appealed from.

3.

The opinion, decision, and judgment appealed from adopted the opinion and decision of the court in **Drum v. Seawell**, M.D. N. Car. (1966), 250 F. Supp. 922. However, the court misconstrued **Drum v. Seawell**, supra, and **Wesberry v. Sanders**, supra, in concluding that population is the **sole** factor for legislative consideration in establishing congressional districts and for judicial consideration in determining the constitutional validity of congressional districts.

4.

The opinion, decision, and judgment appealed from erroneously finds that there is an overvaluation and overweight of votes in the rural geographic areas as contrasted with the votes in metropolitan areas in the composition of the congres-

sional districts. This conclusion is based, to some extent, on inaccuracies in certain facts stated together with odious and invidious comparisons of dissimilar fact situations.

5.

The opinion, decision, and judgment appealed from erroneously found that the 1965 Missouri Congressional Redistricting Act, Section 128.202 through Section 128.305, Missouri Revised Statutes, 1965 Cumulative Supplement, does not comply with Article I, Section 2, Constitution of the United States, and is unconstitutional and void. Population was the principal factor considered by the legislature in enacting this law, and the resulting congressional districts reflect substantial equality in population in harmony with all applicable constitutional principles. Therefore, the 1965 Missouri Congressional Redistricting Act, supra, complies with Article I, Section 2, Constitution of the United States, and is valid.

STATEMENT OF THE CASE.

Prior to the United States census of 1960, the State of Missouri was entitled to eleven members in the House of Representatives of the United States Congress. Although the population of the State of Missouri had increased from 3,954,653 in 1950 to 4,319,813 in 1960, the growth of the State fell behind the average growth of the United States and the number of members in the House of Representatives to which Missouri was entitled was reduced from eleven to ten as a result of the 1960 census. In 1961 the legislature of the State of Missouri divided the State of Missouri into ten congressional districts for the election of members to the House of Representatives. Following this Court's decision in **Wesberry v. Sanders**, 376 U.S. 1 (1964), the constitutionality of the 1961 Missouri Congressional Redistricting Act became the subject of a civil suit in United States District Court for the Western District of Missouri. If districts which were abso-

lutely equal in population were established, each district would contain one-tenth of the population of the State or 431,981.3 people. Under the 1961 Act, the largest district had a population of 506,454 or a population in excess of a mathematically ideal district of 74,473. The smallest district had a population of 378,499 or a population of 53,482 less than a mathematically ideal district. The largest district had a population of 127,955 in excess of the population of the smallest district. In a decision rendered on January 4, 1965, the Court held that inadequate consideration had been given to equality in population between districts in the apportionment scheme and that population differences of 100,000 persons between congressional districts is presumptive malapportionment. Final decision was deferred to give the legislature of the State of Missouri an opportunity to correct malapportionment of the districts, **Preisler, et al. v. The Secretary of State of Missouri, et al.**, 238 F. Supp. 187.

In 1965 the legislature of the State of Missouri considered legislation in an attempt to comply with the opinion rendered in **Preisler**, supra. In the political thicket of the legislative process, a new congressional districting scheme was enacted minutes before the legislature of the State of Missouri was required to adjourn by the Constitution of the State of Missouri. Article III, Section 20 (a) of the Missouri Constitution provides that in a regular session of the legislature, all bills remaining on the legislative calendar after midnight, June 30th, are tabled. The new Act was passed close to the stroke of midnight on June 30, 1965.

Under the 1965 Congressional Redistricting Act the population of the largest district is 474,895 or 42,914 persons in excess of a mathematically ideal district. The population deviation from an ideal district is plus 9.9 per cent. The population of the smallest district is 390,240 or 41,741 persons less than a mathematically ideal district. The deviation

in population from an ideal district is minus 9.6 per cent. The largest has a population of 84,655 in excess of the population of the smallest district. The population ratio of the largest district to the smallest district is 1.21 to 1.

As noted above, each district would contain 10 per cent of the population of the State if absolute population equality between districts were achieved. Under the 1965 Act, the population of the smallest district constitutes 9.03 per cent of the entire population of the State and the population of the largest district constitutes 10.9 per cent of the population of the entire State.

The people of the State of Missouri have elected members of the House of Representatives under three different congressional districting plans in the past six years. In 1960 eleven congressmen were elected from eleven districts. In 1962 and 1964 ten congressmen were elected from the districts established in 1961. In 1966 ten congressmen are being elected pursuant to the 1965 Act. Article III, Section 45 of the Missouri Constitution requires the legislature of the State of Missouri to divide the State into new congressional districts every ten years after the United States census is completed. Therefore, Missouri law requires that new congressional districts be established in 1971.

On February 14, 1966, a complaint was filed in the United States District Court for the Western District of Missouri, claiming that the 1965 Missouri Congressional Redistricting Act was unconstitutional pursuant to Article I, Section 2 of the Constitution of the United States as construed by Wesberry v. Sanders, supra. On August 5, 1966, a three-judge court convened to hear the cause, issued its opinion and judgment finding that population is the sole factor upon which legislative judgment must be based in establishing congressional districts. The Court held that the 1965

Missouri Congressional Redistricting Act does not comply with the command of Article I, Section 2, of the Constitution of the United States and is constitutionally void. The Court permitted elections to be conducted in 1966 under the Act but enjoined elections under the Act in the years 1968, 1970 and thereafter. This appeal is taken from the opinion, decision and judgment of August 5, 1966.

THE QUESTIONS ARE SUBSTANTIAL.

1.

The opinion of the Court in the case on appeal finds that population is the **sole factor** for legislative consideration in establishing congressional districts and for judicial review in determining the constitutional validity of congressional districts. The Court specifically rejected the principle of substantial equality of population among congressional districts as an applicable principle for the exercise of legislative judgment in establishing congressional districts and for the exercise of judicial judgment in determining the constitutional validity of congressional districts. The Court further finds that application of the principle that population is the sole factor to be followed in establishing congressional districts requires that any variation in population among congressional districts in excess of de minimis population deviations is an abridgement of rights guaranteed by Article I, Section 2, of the United States Constitution. Appellants contend that these stringent principles followed by the lower court are in excess of the requirements of Article I, Section 2, of the Constitution and are in conflict with decisions of this Court.

In the landmark case of **Wesberry v. Sanders**, 376 U.S. 1 (1964), this Court held that Article I, Section 2, of the Constitution requires that as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's. The Court recognized that it may not be possible to

draw congressional districts with mathematical precision. However, the fundamental goal in drawing congressional districts must be equal representation for equal numbers of people. Vote diluting discrimination through the device of districts containing widely varied numbers of inhabitants was condemned.

In **Wesberry v. Sanders**, the Court had under consideration the congressional apportionment scheme for the State of Georgia. Under that scheme, the population of the largest district was 823,680 and the population of the smallest district was 272,154. Thus, the largest district had almost three times as many persons as the smallest district.

In **Reynolds v. Sims**, 377 U.S. 533, 1964, this Court handed down its landmark decision holding that the districts of State legislative bodies must be based upon population. A State is required to make an honest and good faith effort to construct legislative districts as nearly of equal population as is practicable. The overriding objective must be substantial equality of population among the various districts so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State. The equal population principle cannot be diluted in any significant way. Mathematical exactness or precision is not a workable constitutional requirement. More flexibility is constitutionally permissible with respect to State legislative apportionment than in congressional districting.

In **Reynolds v. Sims**, the Court commented upon **Wesberry v. Sanders** and stated supplementary principles thereto. Substantial equality of population among congressional districts was recognized as the constitutional test for the validity of congressional districting schemes. Congressional districts drawn so that some voters are given a greater voice in choosing a congressman than others was condemned. Although it was recognized that State legislative apportionment con-

troversies and congressional apportionment controversies are based on different constitutional considerations, it was further recognized that the questions presented are not wholly inapposite.

The opinion of the lower court in the case at Bar discusses at great length the difference in the constitutional considerations of congressional apportionment controversies and State legislative apportionment controversies. Appellants readily admit that the jurisdiction of the federal courts in congressional apportionment cases flows from Article I, Section 2, of the Constitution, whereas jurisdiction of State legislative apportionments flows from The Equal Protection Clause of the 14th Amendment to the Constitution. Nevertheless, it seems clear to appellants that once jurisdiction is established, the principles applicable to equal population among legislative districts are identical in both classes of cases. **Reynolds v. Sims**, makes it clear that the application of equal population principles in State legislative apportionment cases is more flexible than in congressional apportionment cases. This flexibility reflects the exercise of sound, equitable discretion by the Courts rather than the application of totally separate and unrelated principles in the two classes of cases.

The conflicts between the principles followed by the lower court and the principles laid down by this Court are substantial and the overwhelming public interest cries out for a resolution of these conflicts.

2.

The opinion of the lower court declares itself to be in disagreement and in conflict with numerous decisions of other United States District Courts in other jurisdictions. The cases in conflict with the lower court have applied the principles followed by this Court in **Reynolds v. Sims**, either

expressly or impliedly. The lower court in the case at Bar seems to take the position that inasmuch as the jurisdiction of the Court in **Reynolds v. Sims**, is based on The Equal Protection Clause, the principles followed by the Court therein are totally unrelated to congressional apportionment cases in which jurisdiction is based upon Article I, Section 2, of the Constitution. The establishment of arbitrary barriers between the rationale of congressional apportionment cases and State legislative apportionment cases leads the lower court to reject the principle that congressional districts are constitutionally valid if there is substantial equality of population among the various districts.

The Court declares itself to be in conflict with the following decisions of other United States District Courts:

Bush v. Martin, S.D. Tex. (1966), 251 F. Supp. 484;

Moore v. Moore, S.D. Ala. (1965), 246 F. Supp. 578;

Grills v. Branigin, S.D. Ind. (1966), 255 F. Supp. 155;

Kirby v. Illinois State Electoral Board, 251 F. Supp. 909 (1965), N.D. Ill.

In addition to the cases cited above with which the Court declares its express conflict, it is apparent that the Court is also in conflict with **Drum v. Seawell**, M.D. N. Car. (1965), 249 F. Supp. 877, affirmed 383 U.S. 831. All of the above cases either expressly or impliedly construe **Reynolds v. Sims** as supplementing and complementing **Wesberry v. Sanders**, and follow the principle that congressional districts are constitutionally valid if there is substantial equality of population among the various districts.

Grills v. Branigin, supra, is of particular significance in relation to the case on appeal. In the State of Indiana, a mathematically ideal district would have a population of 423,863, compared to an ideal district in the State of Mis-

souri of 431,981. Population deviations in the Indiana districts ranged from 12.8 per cent less than the average district to 7.2 per cent in excess of the average district and the ratio of the largest district to the smallest district was 1.2 to 1. Population deviations in the Missouri districts ranged from 9.6 less than the average district to 9.9 per cent in excess of the average district and the ratio of the largest district to the smallest district is 1.21 to 1. The Indiana Act was held to be constitutional, whereas the Missouri Act was held to be unconstitutional.

Furthermore, it appears that the lower court has misconstrued the opinions of other United States District Courts with which it declares itself in agreement. The lower court has followed **Calkins v. Hare**, (1964) 228 F. Supp. 824. An examination of the cited case reflects that the Court held that in congressional apportionment population is the **controlling** factor and that substantial population inequalities in congressional districts are not permissible, l.c. 829. These principles are obviously in conflict with the **sole factor** doctrine followed in the case at Bar. In **Drum v. Seawell**, (1966) 250 F. Supp. 922, which was followed by the lower court, it was held that a **overemphasis** on factors other than population is constitutionally impermissible, and that **other** factors may not predominate over the requirements of practicable equality. These principles are obviously in conflict with the sole factor doctrine followed by the lower court. **In Maryland Citizen's Committee v. Tawes** (1966), 253 F. Supp. 731, followed by the lower court, it was held that **dominant weight** must be given to the population factor without sacrificing other relevant considerations. This principle is obviously in conflict with the sole factor doctrine.

The conflicts by the lower court with numerous decisions of other United States District Courts create tremendous uncertainty in this State and in many other States as to the

requirements of Article I, Section 2, of the Constitution in regard to the population of congressional districts. The overwhelming public interest requires that this Court resolve the uncertainty.

3.

The opinion of the lower court makes erroneous conclusions and is inaccurate in certain facts stated. It cannot be determined what effect the factual inaccuracies and the erroneous conclusions have on the ultimate decision of the case on its merits. However, a reconsideration seems appropriate.

In footnote 1 the Court states that Missouri's congressional representation was reduced from eleven members to ten members by reason of loss of population between the 1950 census and the 1960 census. This is inaccurate. In fact, the population of Missouri increased from 3,954,653 in 1950 to 4,319,813 in 1960.

In footnote 14, the Court inaccurately states that in 1961 the population of Missouri was 3,418,913. This inaccuracy is almost 1,000,000 less than the actual population of the State. The Court intended to state a comparable factual situation with the State of Maryland which had a population of 3,100,689. Any analogy attempted is obviously fallacious because the population comparisons are in no way comparable. Furthermore, a mathematically ideal congressional district in Maryland would be composed of 387,586 persons, whereas a comparable district in Missouri would be composed of 431,981 persons. Thus, the Court was comparing apples with peaches.

The Court concludes that the rural areas of Missouri are favored over the metropolitan areas in the composition of the congressional districts. This conclusion is erroneous upon analysis of the congressional districts. Approximately one-half of the population of the State of Missouri is in the

St. Louis and Kansas City areas. Kansas City lies on the western border of the State and St. Louis lies on the eastern border of the State. Three congressional districts (1st, 2nd and 3rd) are located entirely within the City of St. Louis and St. Louis County. One congressional district (5th) is located entirely within the City of Kansas City. The 4th congressional district is composed of 402,813 persons. Of this number, 216,952 reside in Jackson County which includes Kansas City. Thus, Kansas City dominates the 4th district. The 6th district is composed of 394,236 persons. Of this number, 110,824 reside in Platte and Clay Counties which are part of the Kansas City metropolitan area and 90,581 reside in Buchanan County which is predominately the city and metropolitan area of St. Joseph. Thus, the 6th district is dominated by metropolitan residents. The 9th district is composed of 451,893 persons. Of this number, 46,181 reside in St. Louis County, 52,970 reside in St. Charles County, and 44,566 reside in Franklin County, all within the metropolitan area of St. Louis, thus, the metropolitan impact upon the composition of the 9th district is of considerable significance. The 8th district, with a population of 443,747, includes Jefferson County in the St. Louis metropolitan area with a population of 66,377 and the metropolitan areas of Cole County (40,761) and Boone County (55,202) in Central Missouri. Thus, metropolitan residents are a significant factor in the 8th district. The 7th district with a population of 425,820 has a significant metropolitan resident factor by reason of Greene County, which is the City of Springfield and its metropolitan area with a population of 126,276. Thus, all of the congressional districts of Missouri, except the 10th, have significant metropolitan resident factors. Furthermore, it is obvious that the 1st, 2nd, 3rd, 4th, 5th, and 6th districts are dominated by metropolitan residents. Therefore, the conclusion by the lower court that the rural voters dominate the congressional districts is erroneous.

The opinion also discusses various plans considered by the legislature prior to the enactment of the 1965 Act. Table IV purports to reflect one such plan. Because census data was unavailable, the entire population of the 1st, 2nd, 3rd and 9th districts is divided by 4 and districts of equal population are reflected. The 4th and 5th districts are treated similarly and reflect equal population. Such calculations are meaningless and conclusions drawn therefrom are necessarily erroneous.

These factual inaccuracies and erroneous conclusions cast doubt upon the entire opinion as a sound judicial consideration of the 1965 Missouri Congressional Redistricting Act on its merits. The legislature of Missouri, in fact, made a good faith effort to comply with constitutional requirements of substantial equality in the population of congressional districts. Population was the principal factor considered by the legislature. The resulting plan is not perfect, but the population deviations among the various districts are constitutionally permissible.

The Missouri legislature must again draw new congressional districts in 1971 after the census of 1970 is reported. This is required by Article III, Section 45, of the Missouri Constitution. The interests of political stability dictate that the present plan remain undisturbed if under maximum population variations it may be constitutionally permissible. The apportionment scheme is well within maximum permissible population variations. Even in the event of doubtful constitutionality, equitable discretion dictates that the Court resolve the doubt in favor of constitutionality and leave the districts undisturbed at this time. This course is particularly appropriate in view of the necessity for further legislative action in the matter in 1971 and in view of the fact that some voters have found themselves in three dif-

ferent districts within the last seven years by reason of legislative districting.

Therefore, substantial questions are presented on the merits of the case which support the exercise of jurisdiction by this Court.

Respectfully submitted,

NORMAN H. ANDERSON
Attorney General of Missouri

J. GORDON SIDDENS
Assistant Attorney General

THOMAS J. DOWNEY
Assistant Attorney General
899 Supreme Court Building
Jefferson City, Missouri
Attorneys for Appellants.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI,

CENTRAL DIVISION

PAUL W. PREISLER, et al.,
Plaintiffs,

vs.

THE SECRETARY OF STATE OF MISSOURI and THE ATTORNEY GENERAL OF MISSOURI,
Defendants;

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,
Intervenor-Defendants.

No. 1064

JUDGMENT AND DECREE

This cause having come on for trial, at which all parties, including Intervenors, were present by counsel, and the Court, having considered the pleadings, evidence, and argument of counsel, and being of the view that a decree should be entered in accordance with the opinion of the Court, which also constitutes the Findings of Fact and Conclusions of Law under Rule 52 (a) of the Federal Rules of Civil Procedure, and is incorporated herein by this reference, IT IS

THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

First: The 1965 Missouri Congressional Redistricting Act, Section 128.202 to 128.305, constituting Chapter 128 of Title IX of the Missouri Statutes, as amended (September, 1965 Pamphlet, V.A.M.S., pages 76-77) does not comply with Article I, § 2 of the Constitution of the United States. Such Act is therefore unconstitutional and void;

Second: Plaintiffs' prayer that defendants be permanently enjoined from performing any and all duties prescribed by law in connection with the Congressional districts created by the aforesaid Act in and for the primary elections to be held in the years 1968, 1970, and thereafter, should be and is hereby granted.

Third: In accordance with plaintiffs' prayer and in the exercise of our judicial discretion, the 1966 congressional elections in Missouri may be held under existing law and shall not be in any way affected by this judgment and decree.

Fourth: The Court retains jurisdiction of this cause for such other and further orders as may be appropriate and required.

Fifth: This judgment and decree is final; jurisdiction being retained solely for the purpose of enabling the Court to reopen this case on appropriate motion by any party for the purpose of presenting for the Court's future consideration the constitutionality of any subsequently enacted legislation relating to Congressional Redistricting for the State of Missouri that may in the future become the law of Missouri.

IT IS SO ORDERED.
(Signed)

Honorable M. C. Matthes
Circuit Judge
United States Court of Appeals
for the Eighth Circuit

Honorable John W. Oliver
United States District Judge

Honorable William R. Collinson
United States District Judge

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI,

CENTRAL DIVISION

PAUL W. PREISLER, et al.,
Plaintiffs,
vs.
THE SECRETARY OF STATE OF MISSOURI and THE ATTORNEY GENERAL OF MISSOURI,
Defendants;
and
F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,
Intervenor-Defendants.

No. 1064

Before M. C. MATTHES, Circuit Judge, and JOHN W. OLIVER and WILLIAM R. COLLINSON, District Judges.
JOHN W. OLIVER, District Judge.

This Congressional reapportionment case is a sequel to **Preisler** v. **Secretary of State of Missouri**, W. D. Mo. 1965, 238 F. Supp. 187, decided January 4, 1965. **Preisler I** pended as consolidated cases Nos. 923 and 924. In those consolidated cases plaintiffs sought and obtained a declaration that the

1961 Congressional Redistricting Act of Missouri was unconstitutional. In this case, No. 1064, the same plaintiffs contest the constitutional validity of Missouri's 1965 Congressional Redistricting Act.[1]

The point of beginning in this case, as it was in **Preisler I**, must be the 1964 decision of the Supreme Court in **Wesberry** v. **Sanders**, 376 U.S. 1 (1964). In **Preisler I** the present defendants conceded that the constitutional principles enunciated in **Wesberry** controlled the disposition of that case "unless the Supreme Court overrules or modifies such decision" (238 F. Supp. at 189). Defendants, as they must, make the same concession in this case. The Supreme Court has not modified or overruled **Wesberry** v. **Sanders**. **Wesberry** v. **Sanders** controlled **Preisler I**; it controls **Preisler II**.

In **Preisler I** this Court held that "**Wesberry** v. **Sanders**, **supra**, teaches that apportionment is void when it appears from the scheme thereof there has been inadequate consideration to equality in population as between districts in the same state" (238 F. Supp. at 190). We emphasized that **Wesberry** v. **Sanders** determined that "the command of Art. I, § 2 (of the Constitution of the United States) . . . means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's" (238 F. Supp. at 190, quoting directly from 376 U.S. at 7-8). Further, we stated that the "mandate [of Art. I, § 2, as construed in **Wesberry** v. **Sanders**] precludes the consideration of 'area' representation as being a valid factor in the determination of Congressional Representation" (238 F. Supp. at 190).

In **Preisler I** this Court stayed its hand "until the Legislature of the State of Missouri has once more had an opportunity to deal with the problem" (238 F. Supp. at 191). We refused to presume that "the Legislature of Missouri will refuse to take all necessary action to comply with its duty

under the Federal Constitution, as well as its own State Constitution.''[2]

Using respectful but unequivocal language, this Court held in **Preisler I** on January 5, 1965, that ''the Legislature of Missouri has an unmistakable duty to reapportion the Congressional Districts of that State in accordance with the principles enunciated in **Wesberry** v. **Sanders** [376 U.S. 1 (1964)]; **Martin** v. **Bush** [376 U.S. 222 (1964)]; and **Colegrove** v. **Green**, [328 U.S. 549 (1946]'' (238 F. Supp. at 191). Jurisdiction of Cases Nos. 923 and 924 was therefore retained ''in order to afford the Legislature of the State of Missouri a full opportunity to 'heed the constitutional mandates' considered in the above cited authorities'' (238 F. Supp. at 191).

The Seventy-third General Assembly of Missouri enacted the legislation now before this Court in 1965 after our decision in **Preisler I.** The 1965 Act, Sections 128.202 to 128.305, constituting Chapter 128 of Title IX of the Missouri Statutes, as amended (September, 1965 Pamphlet V.A.M.S., pages 76-77), originated as Senate Bill No. 320 and was introduced on March 4, 1966. After various changes and substitutions, that bill, as amended, was passed by the 1965 Missouri General Assembly on the final day of its session and was later approved by the Governor on August 5, 1965.[3]

Particular Changes Made by the 1965 Act in regard to the Redistricting Provided in the 1961 Act

The changes made in the 1961 redistricting by the 1965 Act are illustrated in Table I below. The ''deviation'' columns in that table represent the difference between the population allocated to a particular district by the 1961 Act and by the 1965 Act, respectively, and the population that would have been included in each of Missouri's ten congres-

sional districts if absolute mathematical precision was practicable.

An ideal average district would have included 431,981.3 population (4,319,813 total population ÷ 10 districts) in each of the ten districts. We recognize, as did **Wesberry** v. **Sanders**, that "it may not be possible to draw congressional districts with mathematical precision" (376 U.S. at 18). But recognition of that fact may not be converted into an "excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives" (376 U.S. at 18).

Table I is as follows:

TABLE I

Changes in 1961 Redistricting Made by 1965 Act

DIST. NO.	1961 Act POPULATION	1965 Act POPULATION	Changes made by 1965 Act	TOTAL POPULATION SHIFT	1961 DEVIATION	1965 DEVIATION
1	466,482	474,895	Shifts of St. Louis County Townships and one St. Louis city ward between First, Third and Ninth Districts.	+ 8,413	+ 34,500.7	+ 42,913.7
2	506,854	460,501	Shift of St. Louis County Townships and one St. Louis ward between First and Second Districts	—46,353	+ 74,872.7	+ 28,519.7
3	480,222	469,888	Shift of two St. Louis wards between First Second and Third Districts	—10,334	+ 48,240.7	+ 37,906.7
4	418,981	402,813	Shift of four Kansas City wards to Fifth District. Shift of Barton County from Seventh District	+16,168	— 13,000.3	— 29,168.3
5	378,499	405,780	Shift of four Kansas City wards from Fourth District	+27,281	— 53,482.3	— 26,201.3
6	388,486	394,236	Shift of Mercer County from the Ninth District	+ 5,750	— 43,495.3	— 37,745.3
7	436,933	425,820	Shift of Barton County to the Fourth District	—11,113	+ 4,951.7	— 6,161.3
8	452,385	443,747	Shift of Wayne County to Tenth District	— 8,638	+ 20,404.7	+ 11,765.7
9	409,369	451,893	Shift of Mercer County to Sixth District. Shift of St. Louis County townships from First District	+42,524	— 22,612.3	+ 19,911.7
10	381,602	390,240	Shift of Wayne County from the Eighth District	— 8,638	— 50,379.3	— 41,741.3

Table II below is an extension of the table originally set forth in **Preisler I** as it appeared on page 188 of 238 F. Supp. That table repeats the malapportionment variances under the 1961 Act between the Second and Third Districts and the other respective districts, to which we have added new columns for the First District and the 1965 figures for all three districts for the reasons set forth in the footnote below.[4]

Table II is as follows:

TABLE II

Comparison of District Populations Under 1961 Act and 1965 Act

DIST. NO.	POPULATION 1961 Act	POPULATION 1965 Act	Differs from Population of Third District 1961	Differs from Population of Third District 1965	Differs from Population of Second District 1961	Differs from Population of Second District 1965	Differs from Population of First District 1961	Differs from Population of First District 1965
1	466,482	474,895	— 13,740	+ 5,007	— 40,372	+ 14,394	—	—
2	506,854	460,501	+ 26,632	— 9,387	—	—	+ 40,372	— 14,394
3	480,222	469,888	—	—	— 26,632	+ 9,387	+ 13,740	— 5,007
4	418,981	402,813	— 61,241	— 67,075	— 87,873	— 57,688	— 47,501	— 72,082
5	378,499	405,780	—101,723	— 64,108	—128,355	— 54,721	— 87,983	— 69,115
6	388,486	394,236	— 91,736	— 75,652	—118,368	— 66,265	— 77,996	— 80,659
7	436,933	425,820	— 43,289	— 44,068	— 69,921	— 34,681	— 29,549	— 49,075
8	452,385	443,747	— 27,837	— 26,141	— 54,469	— 16,754	— 14,097	— 31,148
9	409,369	451,893	— 70,853	— 17,995	— 97,485	— 8,608	— 57,113	— 23,002
10	381,602	390,240	— 98,620	— 79,648	—125,252	— 70,261	— 84,880	— 84,655

Study of Table I and II reveals that the 1965 Act actually increased the malapportionment that existed under the 1961 Act in three of the ten districts. Under the 1961 Act, the urban First District had an excess of 34,500 population. The 1965 Act increased the population of that district to 474,895, or 42,913 in excess of the ideal average population of 431,981. The Fourth District, on the other hand, was 13,000 population below the ideal average under the 1961 Act. The deficiency in population of that essentially rural district was increased to 29,168 population by the 1965 Act. Under the 1965 Act only 402,813 population was allocated to that district, as contrasted with the 418,981 population that had been allocated to that district under the 1961 Act.

The 1965 Act not only increased the 1961 disparity in regard to the rural Seventh District; it shifted that rural district of declining population on the side of overweighting the votes of the population as contrasted to the 1961 Act that allocated 436,933 population to that district, only 4,951 population in excess of the ideal average.

Slight improvements in the extent of deviation were produced in the other seven districts but the fact remains that in all except one district, the deviations exceeded 10,000 population; that eight out of the ten districts deviate from the ideal average by 19,911 to 42,913; and that four of the districts have deviations of more than 35,000 population. Deviations of that extent can not fairly be described as "minor" deviations.

Examination of Table I and Table II demonstrates that the overall pattern of malapportionment under the 1961 Act and under the 1965 Act was the same. Under both Acts the population deviations from the ideal average district exceeded approximately 20,000 population except for two districts. Both have the same pattern of overvaluation and overweight of the votes in the rural geographical areas, as

contrasted with the votes in the two metropolitan areas of the State. The facts in regard to the St. Louis metropolitan area are stated in footnote 4.

The Kansas City metropolitan area presents a slightly different factual situation. Under the 1961 Act, several heavily populated wards from within the city limits of Kansas City were included in both the Fourth and the Sixth Districts in order to increase the deficient population of those two essentially rural districts. Under the 1965 Act some of those wards were shifted to the Fifth District but, again, the City of Kansas City was split between three separate Congressional districts, the Fourth, Fifth and Sixth. The population of the City of Kansas City under the 1965 Act continued to be utilized to increase the deficient population of two essentially rural districts in order that the geographical area allotted to those rural districts would be permitted to cover essentially the same geographical areas allotted to them by the constitutionality impermissible 1961 Act.[5]

The legislative history of Senate Bill No. 320, of which we take judicial notice, makes clear that the 1965 Missouri General Assembly understood how the State of Missouri could have been divided into ten congressional districts in which, as nearly as practicable, one man's vote in a congressional election would have been worth the same as another's. It is most significant to note that Senate Bill No. 320, after it had been amended, and as it was finally passed and approved, reflected the slightest degree of correction of the constitutionally void 1961 Act of any of the versions of that bill that were before the Seventy-third General Assembly as it considered congressional redistricting in 1965.

Introductory and Caveats in regard to Discussion of Particular Legislative Alternatives and Population Figures

Before discussing the legislative history of Senate Bill

No. 320, we make clear that such discussion is not to be construed by a future Missouri General Assembly as any intimation by this Court that, had the Senate Committee Substitute for Senate Bill No. 320, for example, become the law of Missouri, the redistricting plan there proposed would have been held to be not unconstitutional by this Court. The purpose of our discussion is not to discuss the constitutionality of the available alternatives the 1965 General Assembly refused to enact; we discuss the alternatives rejected by the 1965 Missouri General Assembly to illustrate the fact that no practical reason existed to prevent the 1965 General Assembly from discharging its constitutional duties in regard to congressional redistricting imposed by both the 1945 Constitution of Missouri and by Art. I, § 2 of the Constitution of the United States.

The duty of establishing constitutional congressional districts for Missouri rests primarily upon the General Assembly of Missouri. Both the State and Federal Constitutions so provide. We reiterate that our discussion of the rejected proposals is not to be construed in any way as an implied recommendation of any particular plan or as an approval or recommendation that the only way congressional district lines should be drawn is for a future General Assembly to follow county lines except where forced by a distribution of population to do otherwise. We refrain totally from invading the legislative province of the General Assembly of Missouri. It is quite enough for this Court to discharge its duty of determining whether the 1965 Missouri Act is or is not unconstitutional.

Senate Bill No. 320
As Originally Introduced

Table III below illustrates the Congressional districting originally proposed by Senate Bill No. 320 when it was introduced on March 4, 1965. The first column sets forth the

population allocations made by the constitutionally void 1961 Act. The second column sets forth the population proposed by the original version of Senate Bill No. 320 as calculated from the 1960 census figures in evidence. The third column sets forth the particular counties, townships, and wards that Senate Bill No. 320 proposed to be included in each particular congressional district. The last two columns afford a comparison of the deviations eventually created by the 1965 Act as it was ultimately passed, with the deviations that would have been created had the 1965 General Assembly passed Senate Bill No. 320 as it was originally introduced.

Table III is as follows:

TABLE III

SENATE BILL NO. 320 AS ORIGINALLY INTRODUCED

Comparison of Changes Proposed with Final Enactment

DIST. NO.	POPULATION UNDER 1961 ACT	PROPOSED POPULATION	COMPOSITION OF DISTRICTS UNDER ORIGINAL S.B. 320	DEVIATION UNDER 1965 ACT	DEVIATION UNDER PROPOSAL
1	466,482	443,399	Florissant, St. Ferdinand, Normandy and Washington Townships in St. Louis County; Wards 1 to 5 and 19 to 23, St. Louis City	+ 42,913	+ 11,418
2	506,854	444,934	Airport, Midland, Creve Coeur, Clayton, Hadley, Jefferson, Lincoln, Gravois, Bonhomme, Meramec, Concord and Lemay Townships in St. Louis County	+ 28,519	+ 12,953
3	480,222	460,828	Wards 6 to 18 and 24 to 28 in St. Louis City	+ 37,906	+ 28,847
4	418,981	426,995	Wards 14, 17, 23 and part of 24 in Kansas City, remainder of Jackson County and Counties of Cass, Bates, Vernon, Lafayette, Johnson, Henry and Pettis	— 13,000	— 4,986
5	378,499	426,608	Wards 1 to 16, 18 to 22 and part of 24 in Kansas City and a portion of Jackson County	— 26,201	— 5,373
6	388,486	406,456	Counties of Atchison, Holt, Nodaway, Andrew, Buchanan, Platte, Worth, Gentry, De Kalb, Clinton, Clay, Harrison, Daviess, Caldwell, Ray, Mercer, Grundy, Livingston, Carroll, Chariton and Linn	— 37,745	— 25,525
7	436,933	422,750	Counties of Barton, Jasper, Newton, McDonald, Cedar, Dade, Lawrence, Barry, St. Clair, Benton, Hickory, Polk, Greene, Christian, Stone, Taney, Dallas, Webster, Douglas and Ozark	— 6,161	— 9,231
8	452,385	434,381	Counties of Cooper, Morgan, Moniteau, Miller, Camden, Saline, Howard, Boone, Cole, Maries, Pulaski, Phelps, Laclede, Texas, Shannon, Dent, Reynolds, Carter, Iron, Crawford, Washington and Jefferson	+ 11,765	+ 2,400
9	409,369	439,673	Counties of Putnam, Sullivan, Schuyler, Scotland, Clark, Adair, Knox, Lewis, Macon, Shelby, Marion, Randolph, Monroe, Ralls, Audrain, Pike, Callaway, Montgomery, Lincoln, Warren, St. Charles, Gasconade, Franklin and Osage	+ 19,911	+ 7,692
10	381,602	413,789	Counties of St. Francois, Ste. Genevieve, Perry, Cape Girardeau, Bollinger, Madison, Wayne, Stoddard, Scott, Mississippi, New Madrid, Pemiscot, Dunklin, Butler, Ripley, Oregon, Wright and Howell	+ 41,741	— 18,192
	4,319,813	4,319,813	TOTALS		

It takes but a glance at Table III to understand that had the 1965 Missouri General Assembly passed Senate Bill No. 320 as it was originally introduced, it would have adopted a plan of congressional redistricting more closely in accord to the equal population principle than the bill eventually enacted.

It should, of course, be noted that the same general pattern of undervaluation and underweighting of the votes in the areas of urban population was apparent in original Senate Bill No. 320. But it is also obvious that the extent of overvaluation and overweight given the votes in the areas of rural population was far less drastic in Senate Bill No. 320 as originally introduced than that which resulted from the 1965 General Assembly's final action.[6]

Senate Committee Substitute for Senate Bill No. 320

On March 11, 1965, the Senate Committee to which original Senate Bill No. 320 had been referred adopted and recommended the passage of a Senate Committee Substitute for Senate Bill No. 320.

Table IV reflects the action proposed by that Senate Committee Substitute. There is not sufficient data in the record to calculate the exact population allotted to the First, Second, or Third Districts in St. Louis or in the adjoining Ninth District because the Senate Committee's Substitute bill split wards and townships by assigning particular precincts to each of those four districts. The census figures in evidence are not broken down on a precinct basis. Total populations are therefore combined.

The population figures for the Fourth and Fifth Districts are also combined, because new and additional wards were

created in Kansas City subsequent to the 1960 census, and the current population figures for those wards are not in evidence.*

Table IV is as follows:

TABLE IV

SENATE COMMITTEE SUBSTITUTE FOR SENATE BILL NO. 320

Comparison of Changes Proposed with Final Enactment

DIST. NO.	POPULATION UNDER 1961 ACT	PROPOSED POPULATION	COMPOSITION OF DISTRICTS UNDER S.C.S. FOR S.B. 320	DEVIATION UNDER 1965 ACT	DEVIATION UNDER PROPOSAL
1	446,482	435,383[1]	Normandy, St. Ferdinand, Washington Townships and particular precincts in Airport Township in St. Louis County. Wards 1 through 5, inclusive, 20 through 22, inclusive, and 27 in St. Louis City	+ 42,913	+ 3,402[2]
2	506,854	435,383[1]	Creve Coeur, Hadley, Lincoln, Jefferson, Clayton, Gravois, Concord, Lemay Townships and particular precincts in Bonhomme Township in St. Louis County. Ward 12 and part of precincts 16 through 36, inclusive, Ward 23 in St. Louis City	+ 28,519	+ 3,402[2]
3	480,222	435,383[1]	Wards 6 through 11, inclusive, 13 through 19, inclusive, 24 through 26, inclusive, 28, and particular precincts in Ward 23 in St. Louis City	+ 39,906	+ 3,402[2]
4	418,981	421,081[3]	Wards 23 and 24 in Kansas City and Washington, Blue, Brooking, Fort. Osage, Van Buren, Prairie and Sni-A-Bar Townships in Jackson County, and Counties of Lafayette, Cass, Johnson, Pettis, Henry, Bates, Vernon, St. Clair, Saline and Barton	— 29,168	— 10,900[4]
5	378,499	421,081[3]	Wards 1 through 20, inclusive, and Ward 22 in Kansas City	— 26,201	— 10,900[4]
6	388,486	442,253	Counties of Atchison, Holt, Nodaway, Andrew, Buchanan, Platte, Worth, Gentry, DeKalb, Clinton, Clay, Harrison, Daviess, Caldwell, Ray, Mercer, Grundy, Livingston, Carroll, Chariton, Linn, Sullivan, Randolph and Putnam	— 37,745	+ 10,272
7	436,933	417,399	Counties of Jasper, Newton, McDonald, Cedar, Dade, Lawrence, Barry, Benton, Hickory, Polk, Greene, Christian, Stone, Taney, Dallas, Webster, Wright, Douglas and Ozark	— 6,161	— 14,582
8	452,385	438,253	Counties of Howard, Cooper, Morgan, Camden, Laclede, Boone, Moniteau, Cole, Miller, Pulaski, Texas, Osage, Maries, Phelps, Gasconade, Crawford, Dent, Franklin and Jefferson	+ 11,765	+ 6,272
9	409,369	435,383[1]	Counties of Schuyler, Adair, Macon, Scotland, Knox, Shelby, Monroe, Audrain, Callaway, Clark, Lewis, Marion, Ralls, Pike, Lincoln, Montgomery, Warren, St. Charles, and Florissant, Meramec, Midland and particular precincts in Airport and Bonhomme Townships in St. Louis County.	+ 19,911	+ 3,402[2]
10	381,602	438,214	Counties of Howell, Shannon, Oregon, Washington, Iron, Reynolds, Carter, Ripley, St. Francois, Madison, Wayne, Butler, Ste. Genevieve, Perry, Bollinger, Stoddard, Dunklin, Cape Girardeau, Scott, Mississippi, New Madrid and Pemiscot	— 41,741	+ 6,233
TOTALS	4,319,813	4,319,813			

1. The total population of the geographical area included in the First, Second, Third and Ninth Districts is 1,741,532. One-fourth is assigned each district.
2. One-fourth of total deviation between four ideal districts (1,727,924) and actual population (1,741,533) of area covered by the four districts.
3. One-half of total population assigned Fourth and Fifth Districts.
4. One-half of total deviation between two ideal districts of 863,962 and actual population of 842,162.

Table IV illustrates that it was entirely practicable for the 1965 Missouri General Assembly to have redistricted the State of Missouri with deviations from an ideal average district under a plan that would have produced variances of less than 15,000 for all of the districts. That table also illustrates the fact that the Senate Committee that proposed its Substitute for Senate Bill No. 320 clearly understood the method under which the outstate districts could be assigned sufficient geographical area to produce an infinitely smaller deviation for those districts than was accomplished by the 1965 Missouri General Assembly.

Summary of Remaining Legislative History in regard to Senate Bill No. 320

On March 18, 1965, House Bill No. 710 was introduced and read for the first time in the Missouri House of Representatives. That bill proposed only minor changes in regard to only the Second and Ninth Districts. House Bill No. 710 proposed only to shift some of the 1961 excess 74,872 population of the Second District to the Ninth District.

The Missouri Senate perfected its Senate Committee Substitute for Senate Bill No. 320 on May 11, 1965 and on May 19, 1965, the Senate adopted the bill. On the same day, the House received that bill from the Senate and had it read for the first time. On May 25, 1965, the House referred the adopted Senate bill to the House Committee on Congressional Redistricting. The House passed its own bill on June 23, 1965, and Conference Committees were therefore appointed by both the House and the Senate on June 28, 1965.

Two days later, on June 30, 1965, and on the last day of the regular session, the conference committee reported a Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 320. The bill recommended by the Conference, despite con-

stitutional objections that day filed, was passed just before the midnight mandatory adjournment deadline of the Seventy-third General Assembly's 1965 session.

On July 15, 1965, the presiding officers of both houses, again despite the filing of constitutional objections, signed the bill that became the law of Missouri when signed and approved by the Governor on August 5, 1965.

Detail of Constitutional Objections Filed Before Passage of C.C.S.H.C.S.S.C.S.S.B. 320

The House Journal of the 1965 Missouri General Assembly shows that when the report of the Conference Committee was presented to the House, five Representatives offered constitutional objections to Conference Committee Substitute for House Committee Substitute for Senate Committee Substitute for Senate Bill No. 320. The constitutional objections read as follows:

> We, the undersigned Representatives, hereby offer the following constitutional objections to CCS or HCS for SCS for Senate Bill 320 as adopted and passed:
>
> (1) The districts set up therein are not within the population limitations set out in the federal court order requiring redistricting.
>
> (2) The difference in population between the largest and smallest district is 84,709—the largest district being 21.7% larger than the smallest district.
>
> (3) The first district is 9.9% above the mean of 431,981 and the ten [sic] district is 9.7% below the mean. Three other districts are more than eight percent off from the mean.
>
> (4) The districts are not as compact and nearly equal in population as possible. The chairman of the House Redistricting Committee stated that the pol-

> icy was established to stay within an arbitrary figure of 10% above and below the mean.

We think it not without significance that members of the 1965 Missouri General Assembly directed the attention of that legislative body to its constitutional duties under both the State and Federal Constitutions immediately before that body passed the 1965 Act. Our decision in this case, of course, does not rest on whether or not, in fact, the chairman of the House Redistricting Committee, or any other member or members of the 1965 General Assembly did or did not establish a policy "to stay within an arbitrary figure of 10% above and below the mean," as stated in the constitutional objections just quoted.

The only constitutionally permissible policy that could have been followed by the 1965 Missouri General Assembly is that set forth in Art. I, § 2 of the Constitution of the United States, as that section has been defined by the Supreme Court of the United States in **Wesberry** v. **Sanders**.

We turn now to the legal contentions of the parties.

Plaintiffs' Legal Contentions

Plaintiffs contend that Art. I, § 2, of the Constitution of the United States, as construed in **Wesberry** v. **Sanders**, 376 U.S. 1 (1964), and as applied by this Court in **Preisler I**, is controlling. Anticipating defendants' and intervenors' argument, plaintiffs suggest that "one must be aware of and draw careful distinctions between . . . cases on congressional representative districting under the provisions of Article I, Section 2 of the United States Constitution and the cases . . . on the apportioning of the houses of a State legislature under the provisions of the fourteenth amendment to the United States Constitution."

Defendants' Legal Contentions

Defendants concede that **Wesberry** v. **Sanders** and **Preisler**

I "set forth the low of this case" but they attempt to sustain the constitutionality of the 1965 Act by reliance upon cases determining the validity or invalidity of State reapportionments attacked under the Equal Protection Clause of the fourteenth amendment and by reliance upon particular three-judge congressional apportionment cases that apply the rules of decision applicable to State apportionment cases. Defendants argue that the rules of decision announced in these cases have established "specific guide lines or yardsticks" that are applicable to a congressional districting case. Defendants elaborate their argument by presenting a variety of mathematical formulae relating to (a) the percentage variation of the districts from an average or ideal district; (b) to the ratio between the most populous district and the least populous district; and (c) to the mathematical fraction or percentage of congressional district population to the State population. Mathematical tables are included in defendants' brief in which the actual population variances are stated in smaller mathematical percentages or ratios.

In their conclusion defendants again concede that "the issue before the court is whether the Missouri congressional districts are apportioned so that one man's vote for representatives in Congress is as nearly as practicable worth as much as another man's vote." Defendants also concede, as they must, that inequality of population does in fact exist in Missouri's 1965 redistricting plan. Defendants, however, argue that only "substantial" equality of population is constitutionally required and that such equality may be established by an application of the various mathematical computations set forth in their brief. Further and most importantly, defendants make the firm admission in their brief that "population alone was [not] the only factor considered by the legislature in the congressional apportionment."

The reason defendants conceded in their written brief that

factors in addition to population had in fact influenced the establishment of the districts created under the 1965 Act was made apparent at oral argument. The Assistant Attorney General representing defendants stated that "if you were looking at population as being the sole factor, the only factor that could be considered, . . . I would have to immediately confess . . . that you would probably have to get within a one percent variation in order to say that you have met the population factor, if that is your sole factor."

When asked whether he "read the **Wesberry** case as saying that other factors than population are to be considered in congressional redistricting," defendants' counsel stated: "That is my understanding of the **Wesberry** case."

In response to a comment from the Bench that "you have stated very flatly that should this court rule as a matter of law that population is the single factor, you concede that the redistricting would be void," the Assistant Attorney General stated:

> I would concede that, yes, Judge; that if population is the sole factor, then I think that this plan with deviations approximating ten percent up and down would be void.[7]

It is therefore apparent that defendants' basic contention rests upon the validity of their argument that **Wesberry** v. **Sanders** permits State legislative bodies to consider factors other than population alone in discharge of the constitutional command of Art. I, § 2, of the Constitution that congressional districts be of as nearly equal population as is practicable. We hold that argument is not tenable for the reasons we shall later state.

Intervenors' Legal Contentions

Intervenors attempt to escape the controlling effect of **Wesberry** v. **Sanders** in an apparently different manner. In

substance, however, the argument is the same as that presented by defendants. Intervenors argue that the Supreme Court "appraised its holding in **Wesberry**" when it stated on page 599 of 377 U.S. of **Reynolds** v. **Sims**, that "We determined [in **Wesberry** v. **Sanders**] that the constitutional test for the validity of congressional districting schemes was one of **substantial** equality of population among the various districts. . . . " (emphasis the intervenors').

The words "substantial equality" are lifted from the quoted sentence of **Reynolds** v. **Sims** and utilized by the intervenors to form the major premise of their basic argument. Intervenors rely upon the same line of State apportionment cases that defendants rely on and, in turn, present their share of mathematical computations in support.

Intervenors' effort to convert the words "substantial equality" from the single sentence in **Reynolds** v. **Sims** into a talisman that would negate the controlling impact of **Wesberry** v. **Sanders** is defeated by decisive language in **Reynolds** v. **Sims** itself. On page 560 of 377 U.S., Mr. Chief Justice Warren pointed out neither **Gray** v. **Sanders**, 372 U.S. 368 (1963), nor **Wesberry** v. **Sanders** were either "dispositive of or directly controlling on our decision in these cases involving state legislative apportionment controversies". Further, the Chief Justice stated that "those decisions . . . held that, in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters in a State. . . ." He added most significantly that those decisions "were based on different constitutional considerations [than were involved in **Reynolds** v. **Sims**] and were addressed to rather distinct problems" 377 U.S. at 560. The Chief Justice stated that "our decision in **Wesberry** was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are to be chosen 'by the People,' while

attacks on State legislative apportionment schemes, such as that involved in the instant cases, are principally based on the Equal Protection Clause of the fourteenth amendment'' 377 U.S. at 560.

Wesberry v. **Sanders** was again specifically and definitely referred to in **Reynolds** v. **Sims** in section VI of that opinion which commenced on page 577 of 377 U.S. Again, describing what had been determined in **Wesberry** v. **Sanders**, the Supreme Court held:

> In **Wesberry** v. **Sanders, supra**, the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in **Wesberry**—equality of population among districts—some distinctions may well be made between congressional and state legislative representation. (377 U.S. at 577-578).

After noting that almost invariably a larger number of seats are distributed for State legislative bodies than for congressional seats, the Supreme Court added that ''somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting.'' 377 U.S. at 578.

Intervenors, of course, do not spell out the necessary steps that must be taken to reach the conclusion that the rules of decision applicable to the State apportionment cases be applied to this congressional districting case. At oral argument intervenors indicated their disagreement with the rejection of defendants' argument that **Wesberry** v. **Sanders** did not hold what it does in fact hold.

In that regard intervenors' counsel stated that he did ''not agree with the Attorney General in two respects.''

Intervenors' counsel added that ''the way I read the

Wesberry case, population is the only thing that can be considered . . . . population is the only factor.'"[8]

The intervenors and the defendants were equally disinterested in what factors other than population were taken into account by the 1965 Missouri General Assembly. Counsel did not attempt to suggest any reason why it was not practicable to avoid variances, for example, of something over 84,500 between the First and the Tenth Districts. When asked for some explanation as to "why there was not a closer approximation to the ideal," counsel for the intervenors stated that he knew of none other than that intimated by the Assistant Attorney General—that the scheme "was the best that could be gotten under the practical political circumstances." Counsel added that "I haven't examined any records of the legislature. In don't know that there are any to examine. I haven't inquired."

In the face of such total disinterest to present any factual base to support their requested finding that the 1965 General Assembly had complied with the mandates of both the Constitutions of Missouri and of the United States, intervenors nevertheless contend that "there is not one fact before this Court, nor of which this Court may take judicial notice, indicating any motive or consideration other than 'as nearly as is practicable' obtaining equality by the legislative process." We hold that intervenors' arguments are untenable for the same reasons that defendants' may not be sustained.

We turn now to the detailed answers to the basic arguments presented by both the defendants and the intervenors.

The Constitutional Standard of Art. 1, § 2 Applicable to Congressional Representation Is Population Alone

In **Wesberry** v. **Sanders** the Supreme Court noted that for over thirty years there had never been an question about the

power and the duty of a federal court to exercise jurisdiction in cases involving Congressional redistricting.[9]

The constitutional standard against which Missouri's 1965 Congressional Redistricting Act must be measured was definitively established by **Wesberry** v. **Sanders**. The Supreme Court there stated: "We hold that, construed in its historical context, the command of Art. I, § 2 . . . means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." (l.c. 7-8 of 376 U.S.). The Supreme Court repeatedly emphasized that population was to be the sole factor to be considered in Congressional reapportionment cases. On pages 8 and 9 of 376 U.S. it held that "the history of the Constitution, particularly that part of it relating to the adoption of Art. I, § 2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives." And on page 13 of 376 U.S. it was stated that "the debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants." Again, on page 14 of 376 U.S., it was stated:

> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater value in choosing a Congressman than others.

In **Bush** v. **Martin**, S.D. Tex. 1963, 224 F. Supp. 499, decided before **Wesberry** v. **Sanders**, Judge John R. Brown contrasted "the problem [of congressional redistricting] with

that of the composition of State Legislatures'' (224 F. Supp. at 511). Reasoning from **Gray** v. **Sanders**, 372 U.S. 368 (1963), and **Scholle** v. **Hare**, 369 U.S. 429 (1962), Judge Brown suggested that ''the present indications are that considerable leeway must be allowed the States in the diffusion of its political initiative'' (224 F. Supp. at 511). As to the different question of congressional representation, and with specific reliance upon Art. I, § 2 and the history of the Great Compromise as set forth in Warren, The Making of the Constitution, 141, 159, 163, 220-312 (1927), and Padover, To Secure These Blessings, 152-88, 285-301 (1962), Judge Brown, in anticipation of what was later held in **Wesberry** v. **Sanders**, stated at 511:

> But here we deal with a legislative assembly which, by the Constitution and because of the Great Compromise giving rise to that Constitution, is to bear a direct relation to population, and, at least as between the States, population only. . . . The simple constitutional fact is that so far as (a) the standard of composition of the Congress is concerned, as distinguished perhaps from (b) the standard governing the time and circumstance permitting or requiring judicial intervention, Members of Congress are to be elected on the basis of population and nothing else.

The validity of Judge Brown's definitive holding that the standard of congressional districting was population alone was sharply contested by Judge James L. Noel, Jr. in his dissenting opinion. See page 519 of 224 F. Supp. Judge Noel there italicized that portion of Judge Brown's opinion that stated ''**Members of Congress are to be elected on the basis of population and nothing else**'' in order that precise attention be focused upon the point of judicial disagreement.

Judge Brown was affirmed and Judge Noel's dissent was rejected by the Supreme Court's affirmation of **Martin** v. **Bush**, on March 2, 1964 by per curiam opinion reported in

376 U.S. 233, on the authority of **Wesberry** v. **Sanders**, which had been decided two weeks earlier on February 17, 1964.

On the same day that **Wesberry** v. **Sanders** was decided, the Supreme Court also decided **Wright** v. **Rockefeller**, 376 U.S. 52 (1964), where an attack was made on the congressional districting of the State of New York under the Equal Protection Clause of the fourteenth amendment. Mr. Justice Black, also the author of **Wesberry** v. **Sanders**, affirmed the district court's finding that the Equal Protection Clause had not been violated, and, noting the same basic distinction that Judge Brown had noted in **Bush** v. **Martin**, further stated:

> We do not pass on the question . . . not presented here, that is, whether the state apportionment is constitutionally invalid because it may fail in its objective to create districts based as nearly as practicable on equal population. See **Wesberry** v. **Sanders**, **ante**, p. 1. Since no such challenge has been urged here, the issues have not been formulated to bring it into focus, and the evidence has not been offered or appraised to decide it, our holding has no bearing **on that wholly separate question.** 376 U.S. at 58. (emphasis ours).

That the question presented by an attack under Art. I, § 2 is a "wholly separate question" from that presented by an attack under the Equal Protection Clause of the fourteenth amendment was also emphasized in **Wesberry** v. **Sanders** itself. In footnote 10 on page 8 of 376 U.S., Mr. Justice Black held that because **Wesberry** v. **Sanders** was decided under Art. I, § 2, "we do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment."

We do not share the surprise some commentators have noted that the Supreme Court applied Art. I, § 2 to congressional redistricting instead of considering the Equal Protec-

tion Clause of the fourteenth amendment as the only clause under which the validity of a congressional redistricting plan could be tested.[10]

Almost a hundred years ago, in times more politically troubled than our own, the Supreme Court laid the foundation upon which **Wesberry** v. **Sanders** is based. In **Ex Parte Yarbrough**, 110 U.S. 651 (1884), Mr. Justice Miller, speaking for a unanimous court, answered the argument that "the right to vote for a member of Congress is not dependent upon the Constitution or laws of the United States, but is governed by the law of each State respectively", 110 U.S. at 662-663. That case held that "it is not correct to say that the right to vote for a member of Congress does not depend on the Constitution of the United States" (110 U.S. at 663). Article I, Section 2 was specifically identified as the controlling provision of the Constitution and, after quoting that section, the Supreme Court explained that "the States in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for members of Congress . . . They define who are to vote for the popular branch of their own legislature and the Constitution of the United States says the same persons shall vote for members of Congress in that State" (110 U.S. at 663). "It is not true," Mr. Justice Miller held in conclusion, "that electors for members of Congress owe their right to vote to the State law . . . . " (110 U.S. at 663).

Mr. Justice Stone added over a quarter of a century ago in **United States** v. **Classic**, 313 U.S. 299 (1941) at 314, that "Section 2 of Article I commands that Congressmen shall be chosen by the people of the several states". He noted on page 315 that "while, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states . . . this statement is true only in the

sense that the states are authorized by the Constitution to legislate on the subject as provided by § 2 of Art. I, . . . ''. **Ex Parte Yarbrough** was among the cases cited and relied upon.

Most important for our present discussion, Mr. Justice Stone emphasized in **Classic** that the protection of a citizen's right to vote in a federal election was entirely separate from the protection of his right to vote in a State election. The separate rights are protected by entirely different constitutional provisions. ''Since the constitutional command [of Art. I, § 2] is without restriction or limitation,'' Mr. Justice Stone held, ''the right, **unlike those guaranteed by the Fourteenth and Fifteenth Amendments**, is secured against the action of individuals as well as of the states'' (313 U.S. at 315, emphasis ours).

Plaintiffs in this case seek to protect their rights as conferred by Art. I, § 2 to vote in a federal election. The question of whether those rights have in fact been abridged must be adjudicated under the cases applicable to that question and not under Equal Protection Clause rules applicable to abridgements of their wholly separate right to vote in State elections, which are, to use the words of **Classic** in 1941, ''unlike those guaranteed'' by Art. I, § 2, or to use the more recent words of **Wright** v. **Rockefeller, supra,** which present a ''wholly separate question'' (376 U.S. at 58).

Both **Ex Parte Yarbrough** and **Classic** were cited and relied upon by Mr. Justice Black both in his dissent in **Colegrove** v. **Green,** 328 U.S. 549 at 570 (1946), and in his opinion in **Wesberry** v. **Sanders,** 376 U.S. at 17 (1964). In his **Colegrove** dissent he stated that ''Article I provides that Congressmen 'shall be . . . chosen . . . by the People of the several States' '', and, specifically in reliance upon **Ex Parte Yarbrough,** held that Article I, ''thus gives those qualified a right to vote and a right to have their vote counted'' (328 U.S. at 570).

Almost twenty years before **Wesberry** v. **Sanders** was decided, Mr. Justice Black precisely stated in his dissent in **Colegrove** that Art. I, § 2 requires a State legislature to establish Congressional districts under which "**so far as feasible**, votes be given equally effective weight" (328 U.S. at 571). Earlier on that same page the same thought was expressed by use of the words "to the extent that it is "**practically feasible** [all citizens shall] be given equal representation."

The words "so far as feasible" and the words "practically feasible" in Mr. Justice Black's **Colegrove** dissent expressed the same idea that became the supreme law of the Land when **Wesberry** v. **Sanders** held that Art. I, § 2 must be taken to mean that congressional districts must be of equal population "**as nearly as is practicable.**"

After **Baker** v. **Carr**, 369 U.S. 186 (1962), had been decided we do not believe anyone should have been surprised that the dissents in earlier apportionment cases, both congressional and State, would be adopted as the rule of the Supreme Court in cases decided after that landmark case.[11]

The basic constitutional principle of equal representation established by Art. I, § 2 forbids and eliminates, so far as congressional representation is concerned, the consideration of any factor other than population. Use of such words as "feasible" and "practicable" in a careful statement of the fundamental constitutional principle constitutes but a recognition that the familiar doctrine of **de minimis** is applicable and is designed to make clear that a State legislature would not be expected to create entirely new political subdivision lines in order to have absolute and precise mathematical equality in its congressional districts.

Various courts other than the Supreme Court have stated the basic constitutional principle of equal representation

applicable to congressional districting in words as unequivocal as those used repeatedly in **Wesberry** v. **Sanders.**

For example, **Calkins** v. **Hare,** E.D. Mich. 1964, 228 F. Supp. 824 at 829, in which it was held that "one factor and one alone is controlling, the factor of population." **Meeks** v. **Anderson,** D. Kans. 1964, 229 F. Supp. 271 at 273, held that "one factor, and only one, may be taken into account in apportioning and establishing the congressional districts among the people of a state and that factor is population." And **Bush** v. **Martin, supra,** subsequently affirmed by the Supreme Court, in addition to what has already been quoted, stated the applicable constitutional principle still another way: "Members of Congress are to be elected on the basis of population and nothing else" (224 F. Supp. at 511).

Rejection of Mathematical Arguments

The concept that population and population alone is the sole standard for congressional representation requires that acceptance of invitations to examine population deviations and variations in terms of stated mathematical formulae be limited to discussion of such matters only as they may tend to illuminate the factual situation presented in a particular case.

When legal arguments are based on the theory that a particular congressional districting scheme is only slightly unconstitutional and should be sustained because the votes of the population of a particular district are, in fact, overvalued and overweighted by "only" a plus 9.9% deviation and a minus 9.6% deviation, to use the figures involved in this case, such arguments should be, and are in this case, firmly rejected.

"We do not propose," to use the words of Judge Talbot Smith in **Calkins** v. **Hare,** "to be drawn into a sterile controversy over averages and percentages, whether 9%, 15%, or

other'' (228 F. Supp. at 828). Judge Smith added that the ''as nearly as practicable'' words of **Wesberry** v. **Sanders** can not be utilized as ''an escape hatch for the reluctant'' (228 F. Supp. at 829).

We believe that **Calkins** v. **Hare** correctly put its finger on the reason why a numbers game cannot be played in ruling the legal questions presented in a congressional redictricting case. That case held:

> We do not measure constitutional rights in these terms. They set up wholly false standards. That the average man gets due process in our courts does not justify railroading some luckless scoundrel every now and then. Nor is it an answer to a charge of unconstitutional disfranchisement that only 10,000 people are deprived of their right to vote, this being but a small percentage of the entire voting population. These 10,000 have a right to vote equally with others, no matter what percentage of the total they comprise, We take this to be as clear as the proposition that none of our people can be denied their free right of worship no matter how small the sect, and that none of our people shall be deprived of their right of free speech, no matter how obnoxious to most of us their doctrines (228 F. Supp. at 828).

''The short of the matter,'' to borrow further the words of **Calkins** v. **Hare**, ''is that a citizen can either vote equally with his peers or he cannot.'' ''If he cannot,'' that case continued, ''and we find he cannot with respect to congressional elections in Michigan, his constitutional rights have been abridged'' and the statute must be held to be unconstitutional. 228 F. Supp. at 828.

We make the same finding and holding with respect to congressional elections in Missouri under the 1965 Act. We refuse to hold that the constitutional right of equal representation may be but slightly, and therefore permissibly, abridged on the theory that percentage figures and ratio

numbers make unexplained and substantial population deviations and variances look smaller.

Any possible doubt that population and population alone is the sole standard for congressional redistricting was removed by recent Supreme Court cases dealing with North Carolina and Maryland congressional redistricting.

North Carolina Congressional Redistricting Litigation

Two cases, both of which provide close parallels to **Preisler I** and **Preisler II** in this Court, were involved in the North Carolina congressional litigation.

The first case, **Drum** v. **Seawell**, M.D. N. Car. 1965, 249 F. Supp. 877, as did the second, involved the constitutional validity of both the North Carolina legislative reapportionment and the congressional districts of that State. Both schemes of representation were held to be constitutionally impermissible on November 30, 1965. We focus attention only on the congressional redistricting portion of both cases.

The population figures set forth in the appendix of **Drum I** on page 882 of 249 F. Supp., demonstrate that the three-judge North Carolina court considered a factual situation quite like that presented this Court in **Preisler I.**[12] That court, solely on the authority of **Wesberry** v. **Sanders**, held in **Drum I** that the North Carolina congressional districts were constitutionally void.

Most significantly, that court held that "no valid explanation is offered to justify these glaring discrepancies, if indeed they could be justified" (249 F. Supp. at 880). It also held that "the plaintiff having proven his charge of discrimination on the basis of population by evidence to which the parties have stipulated, the burden was placed upon the defendants to justify the variations from this standard which

were shown to exist. The defendants have failed to meet this burden and we are forced to the conclusion that the plaintiff and those in his class are entitled to relief'' (249 F. Supp. 881.) That court enjoined the holding of congressional elections under the constitutionally void redistricting plan.

Rehearing was denied by the North Carolina three-judge court on March 8, 1966. An immediate appeal was taken to the Supreme Court. On April 4, 1966, less than a month after the denial of hearing, the Supreme Court decided **Drum** v. **Seawell**, 383 U.S. 831. The complete opinion read:

> The motion to advance and expedite consideration is granted. The judgment is affirmed.

The North Carolina Legislature met in special session and passed new schemes of representation for its own legislature and for congressional districts for the United States House of Representatives. In **Drum II** the validity of the new scheme of State representation was again attacked under the Equal Protection Clause of the fourteenth amendment and the validity of the Congressional redistricting was again attacked under Art. I, § 2. **Drum II** is reported as **Drum** v. **Seawell**, M.D. N. Car. 1966, 250 F. Supp. 922. The 1965 North Carolina congressional plan involved in **Drum II** contained population variations and deviations that were, in point of fact, smaller than those contained in Missouri's 1965 plan presently under attack in **Preisler II.** In other words, we look at a case in which the plan held constitutionally void was a ''better'' plan than the plan involved in this case.[18]

Judge J. Spenser Bell, again writing for the same unanimous three-judge court that decided **Drum I**, noted in **Drum II**, as we note in **Preisler II**, that **Reynolds** v. **Sims** points out that ''stricter adherence to equality of population between districts may more logically be required in congressional than in state legislative representation'' (250 F. Supp. at

924). That court, as does this Court, took note of the fact that the 1965 North Carolina Legislature had rejected the recommendation of a Joint Select Committee of the 1965 North Carolina Legislature that had proposed a somewhat better plan than that eventually adopted.

That court determined that the 1965 North Carolina Legislature had been in fact influenced by "presumed minimum mathematical percentages" and that it also had been influenced by "a motive to retain incumbent congressmen" in their old districts (250 F. Supp. at 925).

That court, however, much as has this Court, found that "it is not necessary to a decision of this case to determine whether a motive to retain incumbent congressmen is a legitimate consideration in redistricting" because the overemphasis on factors other than population has created excessive deviation from the standard . . . required" 250 F. Supp. at 924-925.

It is of greatest interest to note that the 1965 State legislative reapportionment plan was approved in **Drum II** at the same time the 1965 congressional redistricting was held to be constitutionally void.

The State reapportionment was approved in spite of the fact the population variances were greater than those involved in the congressional redistricting. In so doing, Judge Bell made clear that the criteria of judgment was different; that the constitutional standards applicable to two different types of cases were not the same; and that while particular "deviations and dispositions render the [State] apportionment scheme of the two houses . . . 'constitutionally suspect,' we cannot say they constitute invidious discrimination" (250 F. Supp. at 924). The congressional redistricting, on the other hand, was held to abridge the Art. I, § 2 constitutional rights of equal congressional representation because more than de

minimis population deviations in fact existed and because the fact that such deviations were smaller than those involved in the State apportionment was of no legal relevance.

We follow **Drum II**, not because the deviations involved in the 1965 Missouri Act are greater than those involved in the 1965 North Carolina Act, but because the rationale of **Drum II** is based upon the legal premise that population alone is the constitutional standard and that any variation above that permitted by a fair application of the doctrine of **de minimis**, factually supported, must be held to be an abridgement of rights guaranteed by Art. I, § 2 of the Constitution.

It is, of course, apparent that if the standards applicable to an Equal Protection Clause case announced in **Reynolds** v. **Sims** could have been said to be applicable to the North Carolina congressional redistricting case, the 1965 North Carolina Congressional Act would have been promptly approved for the obvious reason that, under the facts presented in **Drum II**, the population deviations and variances were **smaller** under the North Carolina congressional act than they were under the North Carolina State Legislature apportionment. Recognition by **Drum II** that it was deciding two very different types of cases prevented the confusion that has infrequently arisen in some of the three-judge congressional cases and in some of the congressional cases decided by particular State courts.

Maryland Congressional Redistricting

Difficulties with congressional redistricting in Maryland antedated the first of three reported federal court decisions in that State. In **Maryland Citizens Committee for Fair Cong. Redist. Inc.** v. **Tawes**, D. Md. 1964, 226 F. Supp. 80, a three-judge court composed of Chief Circuit Judge Sobeloff, Chief District Judge Thomsen and District Judge Northrup accepted jurisdiction of the case on February 3, 1964. The per curiam opinion in that case held:

> In our view the burden rests initially on the plaintiffs to show unconstitutionality, **but when the mathematical imbalance between districts is of sufficient magnitude the burden shifts to the defendants to justify the disparity.** Where the vote of a citizen in one district counts for significantly less than a vote in another district, as is manifestly now the case in Maryland, the disproportion rebuts the presumption of the constitutionality of the statute and requires the State to show that there is a rational basis for the disproportion. (Emphasis ours.)

Jurisdiction was retained to permit constitutional action by the Maryland Legislature. On March 21, 1964, the same court in another per curiam opinion reported in 228 F. Supp. 956 at 958, signed a decree "declaring the existing congressional boundaries unconstitutional and void, but [stayed] the effective date of the decree until after this fall's [1964] elections."

The Maryland General Assembly did not even attempt to comply with its constitutional duty. The three-judge court was forced to act on May 3, 1966, after the April 6, 1966 adjournment of a special session of the Maryland General Assembly that failed to pass any new redistricting bill at all.[14]

In its third opinion in the same case, reported 253 F. Supp. 731, Chief Judge Sobeloff, for a unanimous court, on May 3, 1966, held:

> Chapter 371 of the Acts of 1965, in our opinion, deviates too widely from the constitutional norm of 'one man, one vote' to be tolerated.

In reliance upon **Drum II**, the Maryland three-judge court held:

> Even if a district plan initially comports with the one-to-one formula, discrepancies may be expected to arise with changing conditions. Such discrepancies are unavoidable and must be tolerated for a time, **till the**

> **next census**, but in initial districting the aim should be **to come as closely as possible to a one-to-one ratio. There is no showing in this case that the difference of one-third is unavoidable or justified upon any legally acceptable ground.** We must therefore declare Chapter 371 of the Acts of 1965 invalid and forbid its submission in the referendum set for the fall elections of 1966. (Emphasis ours.)

The Maryland three-judge court laid out temporary congressional districts for the 1966 congressional elections.[15]

The maximum deviation from an ideal average district under the Maryland court's interim decree was smaller than the minimum deviation of 6,161 accomplished by the 1965 General Assembly of Missouri in its 1965 Act. The Maryland court's smallest deviation was only 80 population, a figure even smaller than the deviations established in the Jackson County and Clay County apportionment cases that pended in this Court.[16]

The appeal from the Maryland three-judge court was docketed in the Supreme Court on May 23, 1966 and on May 31, 1966, under the name of **Alton** v. **Tawes**, No. 1344, October Term, 1965, the Supreme Court wrote an opinion that was shorter than its opinion in the North Carolina case. It held (34 Law Week 3406):

> The motion to advance is granted. The judgment is affirmed.

It is obvious that we agree with plaintiffs' and intervenors' reading of **Wesberry** v. **Sanders**, and that we reject defendants' reading as untenable. We turn briefly to defendants' and intervenors' effort to have us apply the rules of decision stated in **Reynolds** v. **Sims** to a case controlled by **Wesberry** v. **Sanders**.

Discussion of Rationale of Congressional Cases Relied Upon by Defendants and Intervenors

Most of the cases involving congressional apportionments have relied solely upon **Wesberry** v. **Sanders.** Such cases have made but brief, if any, reference to **Reynolds** v. **Sims.** Counsel direct our attention to three federal three-judge congressional cases where the rule of **Reynolds** v. **Sims** was applied rather than the rule of **Wesberry** v. **Sanders.** Attention is also directed to several State court cases in which the same thing was done. It is obvious that we do not agree with the rationale of those cases.

Bush v. **Martin,** S.D. Tex. 1966, 251 F. Supp. 484, is relied upon by both the defendants and intervenors. That case, of course, is distinguishable. The 1965 Texas Congressional Redistricting Act was held by a single judge only to be "valid at this time" (251 F. Supp. at 488); "for the time being" (251 F. Supp. at 498); and "for the present" (251 F. Supp. 502). Indeed, Judge Brown stated that "we have . . . emphasized the present" (251 F. Supp. at 515); emphasized that "our approval is limited in duration;" and held that jurisdiction was retained "to enable the 60th Legislature, convening in January of 1967, and any special sessions convened through July, 1967, to take further action" (251 F. Supp. at 517).

Judge Ingraham concurred in the result and in the portion of Judge Brown's opinion and the decree that retained jurisdiction "to enable the Texas Legislature . . . to reconsider and revise as necessary" the legislation held valid for the 1966 congressional elections alone.

We respectfully state that we do not agree with the foundation premise upon which the principal opinion of **Bush** v. **Martin, II,** is based. That opinion assumed, without any supporting authority, that "the term 'as nearly as is practicable' in **Wesberry** seems to be the equivalent of the state appor-

tionment aim of 'substantial equality of population' in **Reynolds**'' (251 F. Supp. at 497). We do not believe that the less rigid criteria applicable to the abridgement of a citizen's right to vote in a State election under the Equal Protection Clause can thus be made applicable to a case in which plaintiff's attack is based on a violation of their right to vote in a federal election conferred by Art. I, § 2 of the Constitution. **Drum II**, above discussed, illustrates how a State apportionment with greater variations than a Congressional apportionment may be held to be valid at the same time a Congressional plan must be held to be void under the more strict rule of Art. I, § 2. **Bush** v. **Martin II** involved a Congressional, not a State, reapportionment, and the rules of decision applicable to Art. I, § 2, not those applicable to an Equal Protection Clause case, should have been applied. We therefore refuse to follow **Bush** v. **Martin II**.[17]

Bush v. **Martin II** was the only case to which our attention was directed in which a particular court stated the manner in which it extrapolated the rule of decision of **Reynolds** v. **Sims** to a congressional districting case. The other three-judge federal cases and the State court cases upon which defendants and intervenors rely simply do just that without any real explanation. What we have said in regard to the basic rationale of **Bush** v. **Martin II** is applicable to the other cases.

Again, for the sake of clarity, we state our express disagreement with the rationale of **Moore** v. **Moore**, S.D. Ala. 1965, 246 F. Supp. 578,[18] and **Grills** v. **Branigin**, S.D. Ind. No. IP-64-C-101, decided February 18, 1966, but not yet reported.

The factual situation in **Grills**, involving the 1965 Indiana Act, is comparable. The maximum variance between Missouri's smallest and largest districts exceeded that approved by the Indiana three-judge court in that case by only 110

population. Population variances of 84,655 and 84,545, respectively, involving a difference of only 110 population, calls for an application of the **de minimus** doctrine in quite a different way than we believe it should be applied in a congressional districting case. Such variances involve approximately a third of the total votes necessary to elect or defeat a single Congressman. Contrary to the majority opinion in **Grills** v. **Branigin**, we do not believe that the statement of such obvious overweighting of the votes of population is made any smaller by stating the facts in terms of percentage figures. We reiterate our disagreement with the majority's opinion in **Grills** v. **Branigin** and state that we are in general agreement with the strong dissenting opinion of District Judge Cole J. Holder.[19]

Reynolds v. **Sims**, itself, at page 580 of 377 U.S., in commenting on the less stringent standards applicable to a State reapportionment case, held that "considerations of area alone provide an insufficient justification for deviations from the equal-population principle . . . people, not land or trees or pastures, vote." That case further held that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population based representation." It added that "citizens, not history or economic interests, cast votes" (377 U.S. at 579-580). It is precisely those factors, plus what the defendants call "political stability," that we are urged to approve as legitimate legislative considerations in this case.[20]

We do not know what can be said in **Preisler II** to uphold the constitutionality of the 1965 Missouri Act when all that the Seventy-third General Assembly did in regard to the 1961 Act held constitutionally impermissible in **Preisler I** was to move three small counties from one district to another and to shift a few wards from one district to another in both metropolitan areas. The undisputed and unexplained facts

establish that the votes of citizens living in five of the 1965 districts are overweighted and overvalued when the votes of those districts are compared with the weight and value given the votes of the citizens who live in the other five 1965 districts. The differences in population simply will not go away. And, under Art. I, § 2 of the Constitution, population is the sole factor upon which both legislative and judicial judgment must be based.

For the reasons we have stated in detail we find and determine that the 1965 Missouri Congressional Redistricting Act does not comply with the command of Art. I, § 2 of the Constitution of the United States and is therefore constitutionally void.

Remedy

Except for the action taken during the pretrial proceedings of this case, the problem of remedy would be indeed troublesome. Under the procedures there established, however, plaintiffs withdrew any attack on the 1965 Act in regard to the 1966 Congressional election. We do not believe that action, taken almost contemporaneously with and without knowledge of **Swann** v. **Adams, supra,** footnote 15, should be set aside.

We recognize that the Supreme Court indicated in that case in no uncertain terms that, as a general and almost universal rule, the lower federal courts are not permitted to authorize further interim elections under constitutionally void apportionment schemes in cases in which State legislatures have been given full and fair opportunity to act in accordance with constitutional commands. We do not, however, read **Swann** v. **Adams** as a direction that district courts are not to exercise their judicial discretion in the formulation of an appropriate remedy in a particular apportionment case.

Several factors have caused us to conclude that plaintiffs'

decision at pretrial should not be disturbed and that the 1966 congressional elections in Missouri should be held under the districts provided in the 1965 Act.

The next regular session of the General Assembly of Missouri, to be elected after the reapportionment of that body which followed the decision of another three-judge panel of this District Court in **Jonas** v. **Hearnes**, W. D. Mo. 1965, 236 F. Supp. 699, will convene in January, 1967.[21] History teaches that the State of Missouri accepts the decisions of the Supreme Court of the United States as the supreme law of the Land. See, for example, **Cummings** v. **State of Missouri**, 71 U.S. 277 (1866), involving the Test Oath in the 1865 Missouri Constitution, which, for the time being, involved another highly emotional public issue.

Missouri, unlike her sister States, sometimes has to be told twice; but **Preisler I** and **Preisler II** will have performed that function. One thing is certain; there will be members of the 1967 Missouri General Assembly who are familiar with the fact Missouri had the painful experience in 1932 of electing Congressmen at large after the decision of **State ex rel. Carroll** v. **Becker, Secretary of State**, (Mo. Sup. Ct. 1932),[1] affirmed 285 U.S. 380 (1932), on the authority of its companion case, **Smiley** v. **Holm**, 285 U.S. 355 (1932), decided the same day.

Missouri was advised in the latter case over thirty years ago that a Missouri General Assembly's failure to reapportion congressional districts in accordance with law required that "unless and until new districts are created, all representatives allocated to the State must be elected by the State at large" (285 U.S. at 374-375). Such, of course, is the command of Section 2 (a)(c) of Title 2, United States Code, enacted pursuant to Art. I, § 4 of the Constitution of the United States.

For the second time, we respectfully direct the attention of the General Assembly of Missouri that will convene in January, 1967 to that legal consequence. It could be, of course, that the 1967 Missouri General Assembly might, in the exercise of its exclusive legislative prerogative, determine that the people of Missouri should elect all their congressmen at large. Power, of course, to make a decision is constitutionally vested in the Missouri General Assembly. But if the 1967 General Assembly decides that the people of Missouri want their Congressmen elected from districts, that decision must be made in light of and implemented by the enactment of legislation that complies with the clear commands of both the Constitution of Missouri and the Constitution of the United States.

Primary responsibility for the discharge of that dual constitutional duty rests on the 1967 General Assembly of Missouri. Should it fail for the third time to discharge its constitutional duties, it, and it alone, will be responsible for the inevitable and totally predictable result that will follow: the election of Missouri's ten congressmen at large in the 1968 election and all subsequent congressional elections until some future Missouri General Assembly enacts a constitutional congressional redistricting act.

In order that an immediate appeal may be perfected so that final judgment may be rendered by the Supreme Court before January, 1967, we enter a decree that will permit the 1966 Congressional elections to be held under the present law but in which the 1965 Missouri Congressional Redistricting Act is held to be constitutionally null and void. We shall retain jurisdiction of this case for the purpose of reviewing any new congressional redistricting plan that may be enacted by a future General Assembly of Missouri and signed by the Governor.

If we find that such new legislation is consistent with the

constitutional command of Art. I, § 2, this case would then be reopened and our decree will be set aside.

If we should find otherwise, the congressional elections for Missouri will be ordered conducted at large until new and constitutional districts are created.

Pursuant to Rule 56 (a) of the Rules of Civil Procedure this opinion shall serve as our findings of fact and conclusions of law.

M. C. MATTHES, Circuit Judge, Concurring.

Initially, I entertained the view that the 1965 Missouri Congressional Redistricting Act conformed to the mandate of Article 1, § 2 of the Constitution of the United States and Article 3, Section 45 of the Constitution of Missouri. Subsequent deliberation, in light of the teachings of the Supreme Court in the controlling case of **Wesberry** v. **Sanders**, 376 U.S. 1 (1964), has compelled me to conclude that the plan is constitutionally unacceptable. Judge Oliver's painstaking analysis of the plan, his demonstration of the wholly unrealistic disparities in the envisioned districts, and his sound exposition of the applicable legal principles should dispel any serious doubt about the matter.

We have emphasized that the responsibility for enacting a constitutionally permissible redistricting plan rests on the Legislature of Missouri. Although the task may be fraught with difficulties, certainly it is not an impossible one. We are convinced that a conscientious effort, motivated by a desire to satisfy the requirements of the federal and State constitutions, will result in the formulation of congressional districts which will comport with the demands of the Constitution of the United States and the Constitution of Missouri.

FOOTNOTES

1. (Page 22)

Missouri, by reason of loss of population between the 1950 census and the 1960 census, was required by Article 3, Section 45 of the Constitution of Missouri and by Section 2 (c)(5) of Title 2, United States Code, to redistrict the State of Missouri into ten new districts (rather than the eleven districts to which it was entitled under the 1950 census) or, failing so to do, under the federal statute, to elect the ten congressional representatives allotted it under the 1960 census by elections-at-large.

The failure of the Missouri General Assembly to properly redistrict after the 1930 census forced the election of Missouri's entire congressional delegation to be held at large in 1932. For the history of that failure see **State ex rel. Carroll** v. **Becker, Secretary of State,** (Mo. Sup. Ct. 1932) 329 Mo. 501, 45 S.W. 2d 533, affirmed 285 U.S. 380 (1932), on the authority of **Smiley** v. **Holm,** 285 U.S. 355 (1932).

2. (Page 23)

Article 3, Section 45, of the 1945 Missouri Constitution provides that "when the number of representatives to which the state is entitled in the House of Congress of the United States under the census of 1950 and each census thereafter is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be."

The General Assembly of Missouri is therefore under mandate to act under both the Constitution of Missouri and the Constitution of the United States. We, of course, consider only its duty under the Federal Constitution. We note, however, that the addition of Article 3, Section 45, to the 1945 Missouri Constitution imposed the duty to provide districts "of contiguous territory as compact . . . as may be" formerly, but not presently, required by federal law. See **Wood** v. **Bloom,** 287 U.S. 1 (1932), for the history of the elimination of the compactness of contiguous territory requirement from the federal law.

3. (Page 23)

Although Senate Bill No. 320, as amended, became the law of Missouri on August 5, 1965, plaintiffs did not take any action to contest the constitutional validity of that legislation until Janu-

ary 17, 1966. On that date plaintiffs filed appropriate motions in Cases Nos. 923 and 924, invoking the jurisdiction of this Court that had been retained in those cases.

At a pretrial conference held in Cases Nos. 923 and 924 on January 25, 1966, all parties agreed on procedures that permitted (1) the withdrawal of the motions filed in those cases; (2) the filing of a new complaint that would contest the validity of the 1965 legislation for the 1968 and 1970 elections but that would not put in issue the constitutional validity of that legislation so far as the 1966 congressional elections were concerned; and (3) agreed upon a time schedule that contemplated a final decision from this Court before the convening of the next regular session of the General Assembly of Missouri in January, 1967.

This case, Case No. 1064, accordingly was filed February 14, 1966; it was at issue on February 25, 1966; and, at a pretrial conference held March 9, 1966, all facts not admitted by the pleadings were stipulated of record, the parties further agreeing that there are no disputed questions of fact within the meaning of Rule 56 of the Rules of Civil Procedure. Final briefs were filed May 17, 1966, and oral argument was heard May 27, 1966.

4. (Page 26)

The Second and Third Districts, both located in the St. Louis metropolitan area, were the two districts under the 1961 Act that deviated the greatest from the ideal average. Those two districts alone were allocated 123,112 more population under the 1961 Act than should have been included under the ideal system of representation (the Second District was allotted 74,872 more population than the ideal average under the 1961 Act; the Third District, 48,240).

The figures on the First District were added to Table II because that district became the most malapportioned district under the 1965 Act. Its 1965 assigned population of 474,895 exceeded the ideal average by 42,913 population. The discrimination against the St. Louis metropolitan area, evidenced by the 1961 Act, was continued under the 1965 Act. The 1965 Act allocated 109,338 excess population to the First, Second and Third Districts, all located in that geographical area (the First District exceeded the ideal average by 42,913 population; the Second by 28,519; and the Third by 37,906). While the ranking of the First, Second and Third Districts so far as their respective malapportionment was concerned was changed under the 1965 Act, those three districts

again were the most acutely malapportioned under the 1965 Act as they had been under the 1961 Act.

Appendix A attached hereto illustrates all changes made by the 1965 Act and should be studied in conjunction with Table I.

5. (Page 29)

Under the 1961 Act the Sixth District to the north of Kansas City had an allocation of only 388,486 population with a minus deviation from an ideal district of 43,495. The 1965 Act's effort to correct that obviously unconstitutional disparity was reflected by the 1965 Act's shift of rural Mercer County, population 5,570, from the Ninth District in order to cut the Sixth District's minus deficiency to 37,745.

The Fourth District had a 418,981 population under the 1961 Act. The 1965 shift of Kansas City wards to the Fifth District further depleted the Fourth's assigned population. The 1965 Act therefore also shifted rural Barton County, population 11,113, from the Seventh District to the Fourth District with the total result that the Fourth District's 13,000 minus deficiency was increased from 13,000 to 29,168 and the Seventh District, from which Barton County was taken, became another rural district in the 1965 redistricting with a population below the ideal average of 431,981 population.

6. (Page 33)

Although it is a well known fact that the population trends in Missouri, like most other States in the United States, continue to reflect population gains in urban areas and population losses in rural areas, we believe and find that the use of the 1960 census figures are the most practicable set of figures for use both by the Missouri Legislature and by this Court because they are the only available complete population figures upon which either legislative or judicial judgment may be predicated.

We make this finding in spite of the fact that between 1950 and 1960, except for counties that adjoin either Jackson County in which Kansas City is located, and those counties that adjoin St. Louis County, only twenty of Missouri's 114 counties that lie outstate showed gains in population; and that in 10 of those 20 outstate counties, the gain was less than 1,000. We have also considered the fact that, for a detailed example, the population loss between 1950 and 1960 in the 1965 Tenth District, to which the smallest population of only 390,240 was assigned, had a total net loss of 34,705 between 1950 and 1960, in spite of the fact that

three counties located in that district under both the 1961 and 1965 Acts registered modest population gains. We base our finding in this regard on the fact that Article 3, Section 45 of the Missouri Constitution requires congressional redistricting after each national census in accordance with those figures and upon our conviction that there is no other practicable method available for use by the Missouri Legislature to make appropriate adjustment to catch up with the known but unascertainable trends of population shifts.

See copy of Plaintiff's Exhibit No. 4 in the Appendix B for further information in regard to population gains and losses.

7. (Page 40)

Defendant's counsel referred to factors other than population which he suggested could have properly been and, by implication, were in fact considered by the Missouri General Assembly in connection with the 1965 Act. Those factors were described as "political," "economic," "history and tradition and what not." Defendants' counsel argued that "the political factors and the economic factors and the historical factors that are brought to bear" on the members of the General Assembly made the discharge of that legislative body's dual constitutional duty a difficult task. Defendants' counsel stated that "I support the plan as being a practical one worked out in the ambit of politics. . . . I go a step further and concede that this is a border line case." This Court was urged "for the sake of political stability to leave the districts undisturbed until 1971."

8. (Page 43)

Intervenors stated their second disagreement with defendants by saying "I also do not agree with the Attorney General in his concession that our Act is bad when that [population alone] is the only factor considered, and I don't see how this conclusion can be reached in light of the cases that have been decided by the other three-judge courts around the country. . . . "

It perhaps should be added that a third area of disagreement exists between the intervenors and the defendants. Defendants concede that, at best, this is a "border line" case. Intervenors, on the other hand, argue that "the Missouri factual situation does not present even a close question."

9. (Page 44)

As noted in footnote 1 above, the case of **State ex rel. Carroll** v. **Becker, Secretary of State** was decided on the merits by the

Supreme Court of the United States in 1932. That case involved Missouri's Congressional redistricting that followed the 1930 United States census and ordered that the 1932 Congressional elections in Missouri be held at large.

10. (Page 47)

See, for example, page 90-91 of Robert B. McKay: "Reapportionment—The Law and Politics of Equal Representation," Twentieth Century Fund Study (1965), where it was stated: "The surprise in **Wesberry** was not on the justiciability issue, which was hardly difficult to predict, ... The surprise was rather that six members of the Court concluded that their authority for the invalidation of the congressional districting plan in Georgia stemmed from article I section 2 of the Constitution and not from the equal protection clause of the fourteenth amendment."

11. (Page 49)

See and compare the pattern, for example, of **Reynolds** v. **Sims** in which Mr. Justice Douglas' dissent in **South** v. **Peters**, 339 U.S. 276 (1950), was expressly adopted in footnote 29 at page 555 of 377 U.S., and in which another portion of Mr. Justice Black's **Colegrove** dissent was expressly adopted in footnote 40 at page 563 of 377 U.S.

12. (Page 52)

The deviation of 136,335 for North Carolina's First District was considerably greater than the 74,872 deviation of Missouri's 1961 Second District, but except for that difference, the deviation of all the other districts are quite comparable. Of course, the constitutional invalidity of both districting plans was apparent on their face.

13. (Page 53)

Footnote 4 on page 925 or 250 F. Supp. shows that the 1965 North Carolina Act had deviations that ranged from minus 8.91 to plus 8.39, as compared to the range in Missouri's 1965 Act of from minus 9.6 to plus 9.9. The greatest North Carolina population difference between its largest and its smallest district was 71,640; the comparable 1965 Missouri figure is 84,655. The variance between the largest Missouri district and the three smallest Missouri districts exceeded the maximum North Carolina figure. The variance between Missouri's second largest district and its second smallest district, the Third and the Sixth, respectively, was 75,652, a figure greater than North Carolina's maximum variation of 71,640. See Table II above for exact calculations.

14. (Page 56)

The Maryland Act declared unconstitutional in **Tawes I** and **Tawes II** involved a factual situation quite comparable to that presented this Court in **Preisler I**. The maximum variance under the Maryland Act was 113,505 in a State with a population of 3,100,689. The maximum variance under the 1961 Missouri Act was 125,251 in a State with a population of 3,418,913. The only real difference in the litigation history of **Preisler I** and **Tawes I** and **II** was that the Attorney General of Maryland "forthrightly declared to the General Assembly [of Maryland] his opinion that the 1965 redistricting measure may have created a disparity too great to be tolerated under the Supreme Court's requirement of equal representation, and urged passage of a new congressional districting plan more closely conforming to the requirements of the Constitution as interpreted by the Supreme Court."

15. (Page 57)

In refusing to permit Maryland still further time to comply with the command of Art. I, § 2, that court was influenced, as this Court must be influenced, by the rule applied by the Supreme Court in **Swann v. Adams**, 383 U.S. 210. In that case a three-judge District Court again permitted Florida to conduct elections on an interim basis under a State apportionment plan it had decided was unconstitutional. The Supreme Court reversed, holding "that the effect of the District Court's decision is to delay effectuation of a valid apportionment in Florida until at least 1969." The case was remanded to the District Court "so that a valid reapportionment plan will be made effective for the 1966 elections" (383 U.S. at 212).

The appeal in that case, incidentally, was filed February 1, 1966, and decided by the Supreme Court on February 25, 1966 (34 Law Week 3295). It is quite apparent that the Maryland court read an additional message from the speed and terseness with which the Supreme Court affirmed the North Carolina court in **Drum** and reversed the Florida court in **Swann** that, in this election year of 1966, it expected both lower courts and State legislatures to move with more than deliberate speed in regard to reapportionments. See also **South Carolina v. Katenbach**, 383 U.S. 301 at 307, decided March 7, 1966, in which the Supreme Court noted that it had expedited the hearing of that case involving the Voting Rights Act of 1965 "because of South Carolina's desire to obtain a ruling prior to its primary elections in 1966."

16. (Page 57)

In Case No. 15745-1 in this Court, **Davis et al.** v. **Curry et al.**, the reapportionment of the governing body of Jackson County, Missouri, was voluntarily accomplished by creating two representative districts that varied only 792 population from ideal average districts of 330,000 population. The malapportionment corrected was 440,379 in the Western District of Jackson County and 182,361 in its Eastern District.

In No. 15902-2, **Wnuk et al.** v. **Bywaters et al.**, also in this Court, a similar voluntary reapportionment of Clay County, Missouri, was accomplished with a resultant population deviation of only 166 from an ideal district of 43,237. The malapportionment corrected was 75,787 in Clay County's Western District and 11,687 in its Eastern District. Experience in those two reapportionment cases, both of which pended in this Court, is convincing evidence that Missouri legislative bodies can discharge their constitutional duty to reapportion in an exemplary manner.

17. (Page 59)

We have, of course, heretofore indicated our agreement with **Bush** v. **Martin I.** The result reached in this case, in the sense that the 1966 congressional elections will be held under the 1965 Act, is not inconsistent with the result reached in **Bush** v. **Martin II.** But the manner in which the not dissimilar results were reached is radically different.

We state our respectful disagreement with the rationale of **Bush** v. **Martin II** clearly in the interest of the general administration of federal justice. It has been the practice of this District Court to register its views with candor in order that real conflicts of opinion in the lower federal courts be made apparent on the face of our opinions. See **United States** v. **Taylor,** W. D. Mo. 1963, 224 F. Supp. 82 at 84, for a relatively recent example of this practice.

In spirit, we believe that our practice reflects the same spirit reflected by Judge John R. Brown in **Martin** v. **Bush II,** when he attempted "to make certain that in the inevitable (and healthy) review of this decision the issue of sheer numerical disparity will be posed squarely for the Supreme Court's approval or rejection" (251 F. Supp. at 499). We, and we suspect he, were disappointed to learn that no appeal was taken in **Bush** v. **Martin II.** Certainly an appeal in this case will again present that question squarely to the Supreme Court.

18. (Page 59)

Moore v. **Moore** is also clearly distinguishable on the facts. The 1965 Alabama Act's greatest maximum deviations from the ideal average district were only plus 29,788 and minus 24,717, as contrasted with plus 42,913 and minus 41,741 deviations under the 1965 Missouri Act. The real measure of devaluation of a citizen's vote, of course, is more clearly reflected by the population differences between the largest and smallest districts which, in the case of Alabama, was 54,505, as compared to 84,654 under the 1965 Missouri Act. It is pure sophistry to say that such overweighting of votes of particular geographical areas in a State is accurately represented by transposing numbers of citizens into deviations of "only" plus 7.3% and minus 6%, in the case of the 1965 Alabama Act, and plus 9.9% and minus 9.6% in the case of the Missouri Act. One can well understand why the Supreme Court held in **Roman** v. **Sincock**, 377 U.S. 695 at 710 (1964), that even in regard to State reapportionments, "the problem does not lend itself to . . . uniform formula, and it is neither practicable or desirable to establish rigid mathematical standards for evaluating the constitutional validity of a state legislative apportionment scheme under the Equal Protection Clause."

19. (Page 60)

We are, of course, familiar with **Kirby** v. **Illinois State Electoral Board**, N.D. Ill. 1965, 251 F. Supp. 908. Chief Justice Campbell's opinion does not make clear the legal or factual theories upon which he based his opinion that the "fair compromise between the divergent proposals submitted by the parties" was, under the law and facts, "a constitutional reapportionment of Illinois congressional districts" (251 F. Supp. at 910). If that opinion intended to indicate its agreement with the rationale of **People** v. **Kerner**, 33 Ill. 2d 460, 211 N.E. 2d 736 (1965), then, for the sake of clarity in defining the areas of conflict, we state that what we have said about **Moore** v. **Moore** is applicable to both the Illinois federal and state court cases. The same thing must be said in regard to **Levitt** v. **Maynard**, 105 N.H. 447, 202 A. 2d 478 (1964), cited and relied upon by intervenors.

20. (Page 60)

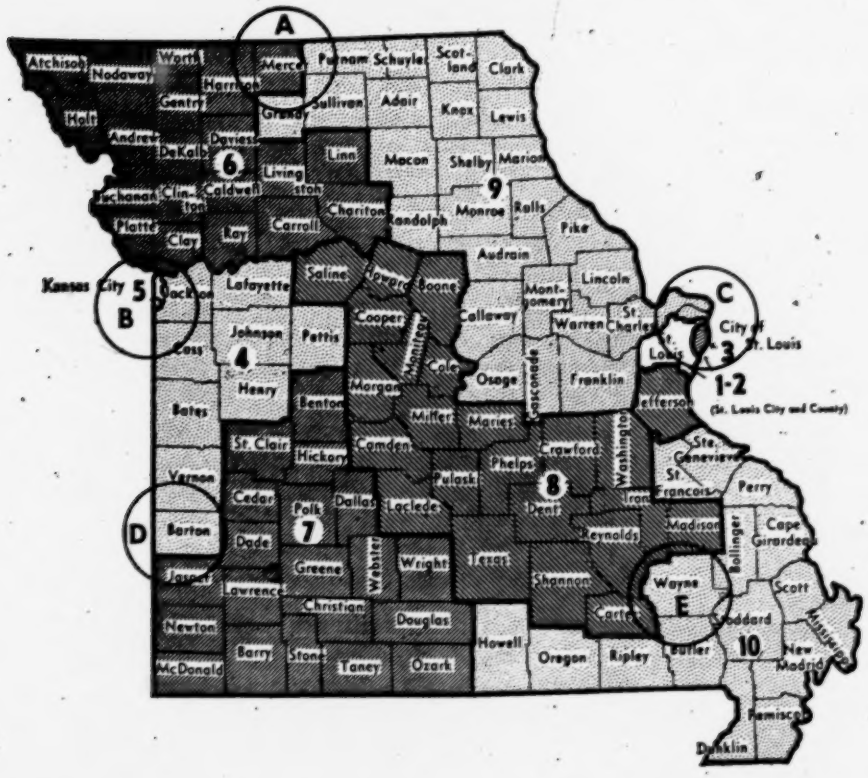
See footnote 7 above for defendants' "political stability" argument and their arguments concerning "political," "economic," "historical," and "traditional" factors.

21. (Page 62)

On July 8, 1966, the three-judge court sitting in **Jonas** v. **Hearnes** formally approved that State apportionment plan submitted in that case.

APPENDIX A

Illustration of Changes Made by 1965 Act in 1961 Redistricting Plan



This map shows the ten congressional districts of Missouri under the 1965 Act. The 1961 districts may be easily visualized by noting the five changes above circled that were made in the 1961 districts by the 1965 Act:

A. Mercer County (pop. 5,750) shifted from Ninth to Sixth District.

B. Several Kansas City wards (total pop. 27,281) shifted from Fourth to Fifth District.

C. Several St. Louis wards and St. Louis County townships shifted among First, Second, Third and Ninth Districts.

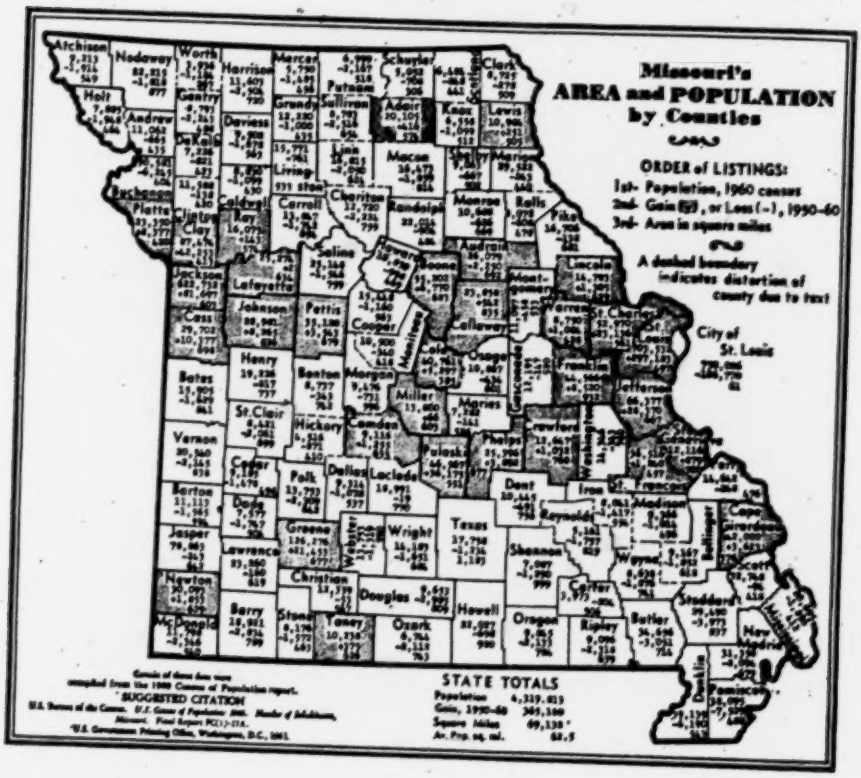
D. Barton County (pop. 11,113) shifted from Seventh to Fourth District.

E. Wayne County (pop. 8,638) shifted from the Eighth to the Tenth District.

APPENDIX B

Plaintiff's Exhibit No. 4

(From the Official Manual, State of Missouri, 1961-1962; page 470)



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AN ACT

To repeal sections 128.202, 128.212, 128.222, 128.232, 128.242, 128.252, 128.262, 128.272, 128.282, 128.292, 128.302 and 128.305, RSMo 1963 Supp., relating to congressional districts, and to enact in lieu thereof twelve new sections relating to the same subject.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Sections 128.202, 128.212, 128.222, 128.232, 128.242, 128.252, 128.262, 128.272, 128.282, 128.292, 128.302 and 128.305, RSMo 1963 Supp., are repealed and twelve new sections enacted in lieu thereof, to be known as sections 128.202, 128.212, 128.222, 128.232, 128.242, 128.252, 128.262, 128.272, 128.282, 128.292, 128.302, and 128.305, to read as follows:

128.202. The state of Missouri is hereby divided into ten congressional districts, the legal voters of each district to elect one member of Congress of the United States.

128.212. The first district shall be composed of the following townships from St. Louis County: Airport, St. Ferdinand, Normandy and Washington; and the following precincts in Florissant Township, St. Louis County: 1, 2, 3, 4, 5, 19, 22, 23, 24, 25, 26, 29, 30, 31, 35, and all of the precinct 20 except that part which is bounded on the south by Redman Road, on the west and north by Bellefontaine Road and on the east by the track of the C.B. and Q. Railroad; and the following wards in the City of St. Louis: 1, 2, 3, 4, 5, 20, 21, 22 and 27.

128.222. The second district shall be composed of the following townships in St. Louis County: Bonhomme, Clayton, Concord, Creve Coeur, Gravois, Hadley, Jefferson, Lemay, Lincoln, Meramec and Midland; and ward 12 of the City of St. Louis.

128.232. The third district shall be composed of the following wards in the City of St. Louis: 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26 and 28.

128.242. The fourth district shall be composed of the following wards in the city of Kansas City, Wards 15, 17 and 24, and the following townships in Jackson County, to-wit: Washington, Blue, Brooking, Fort Osage, Van Buren, Prairie, and Sni-A-Bar; and the following counties, Lafayette, Cass, Johnson, Pettis, Henry, Bates, Vernon and Barton.

128.252. The fifth district shall be composed of the following wards in the city of Kansas City, Wards 1 through 14, inclusive, and Wards 16, 18, 19, 20, 22, 23 and 25.

128.262. The sixth district shall be composed of the following counties: Atchison, Holt, Nodaway, Andrew, Buchanan, Platte, Worth, Gentry, DeKalb, Clinton, Clay, Harrison, Mercer, Daviess, Caldwell, Ray, Livingston, Carroll, Chariton and Linn.

128.272. The seventh district shall be composed of the following counties: Jasper, Newton, McDonald, Cedar, Dade, Lawrence, Barry, St. Clair, Benton, Hickory, Polk, Greene, Christian, Stone, Taney, Dallas, Webster, Wright, Douglas and Ozark.

128.282. The eighth district shall be composed of the following counties: Cooper, Morgan, Moniteau, Miller, Camden, Saline, Howard, Boone, Cole, Maries, Pulaski, Phelps, Laclede, Texas, Shannon, Dent, Reynolds, Carter, Iron, Crawford, Washington, Jefferson and Madison.

128.292. The ninth district shall be composed of the following counties: Adair, Audrain, Callaway, Clark, Franklin, Gasconade, Grundy, Knox, Lewis, Lincoln, Macon, Marion, Monroe, Montgomery, Osage, Pike, Putnam, Ralls, Randolph, St. Charles, Schuyler, Scotland, Shelby, Sullivan and Warren; and all of Florissant Township, St. Louis County, except

the following precincts: 1, 2, 3, 4, 5, 19, 22, 23, 24, 25, 26, 29, 30, 31, 35 and all of precinct 20 except that part which is bounded on the south by Redman Road, on the west and north by Bellefontaine Road and on the east by the track of the C.B. and Q. Railroad.

128.302. The tenth district shall be composed of the following counties: St. Francois, Ste. Genevieve, Perry, Cape Girardeau, Bollinger, Stoddard, Scott, Mississippi, New Madrid, Pemiscot, Dunklin, Butler, Ripley, Howell, Oregon and Wayne.

128.305. All references in this act to boundaries, townships, wards, and precincts within the city of St. Louis and St. Louis County mean those boundary lines, townships, wards and precincts as they existed on the first day of July 1960 and all references to boundaries, townships, wards and precincts within Jackson County mean those boundary lines, townships, wards and precincts as they existed on the fifteenth day of June 1965.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 738.

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,
Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,
Appellees.

On Appeal from the United States District Court for the Western District of Missouri, Central Division.

MOTION TO AFFIRM.

PAUL W. PREISLER,
4274 Shenandoah Avenue,
St. Louis, Missouri 63110,
Attorney for Appellees.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-4477.

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Appellees, pursuant to Rule 16 of the Revised Rules of the United States Supreme Court, move the Court to affirm the final judgment and decree sought to be reviewed on appeal on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE.

The "Statement of the Case" by Appellants in their "Jurisdictional Statement" is adopted with the following additions and corrections.

The facts cited by Appellants in their "Statement of the Case" are correct but incomplete and in the manner presented may result in many misleading impressions, interpretations, and implications.

Thus, as stated by Appellants that in **Preisler v. Secretary of State of Missouri**, 238 F. Supp. 187 (hereinafter cited as **Preisler I)** the District Court held that population differences of 100,000 persons between congressional districts is presumptive malapportionment **(Preisler I**, page 190), however, it must be emphasized the District Court did not set forth this figure as a standard of permissible variance.

Then, in an attempt to excuse the failure of the Legislature to enact a constitutional redistricting act, Appellants cite that the Act complained of was passed in the ". . . political thicket of the legislative process . . ." in the last few minutes just before the constitutionally compulsory adjournment of the legislative session at midnight of June 30, 1965. That the Act was enacted in the last few minutes before final adjournment does not condone its unconstitutionality; the Legislature had the prior six months of the 1965 session in which to contemplate, discuss, prepare, and enact legislation of such importance.

Next, Appellants manipulate the calculations so as to make the differences between district populations appear of lesser value and lesser importance. First, the population differences are compared to the "ideal district" or average district population which makes the differences appear about one-half of the true differences. Second, Appellants calculate the per cent variance of the district population from the average population. Then, Third, the

population of the largest district is compared to the smallest, resulting in a ratio of 1.21 to 1. This ratio represents an actual variance of over 20% (twenty per cent), which is far from equality. Finally, by calculating that each Missouri district contains 10.0% (ten per cent) of the State's population, if absolute equality between districts were achieved, and calculating that the population of the smallest district constitutes 9.03% of the entire population of the State and the largest 10.9%, Appellants try to make it appear that the population differences are insignificant. Actually, the population difference between largest and smallest district is nearly 20% (twenty per cent), an amount not satisfying the constitutional requirements of congressional districting, and was held to be unconstitutional by the District Court in the instant case **(Preisler II)**.

Finally, Appellants make it appear that the instant action (**Preisler II**) is a new and original case challenging for the first time and belatedly the congressional districting in Missouri. **Preisler I** was dismissed without prejudice and Plaintiffs filed a new suit, the instant case (hereinafter referred to as **Preisler II**), in accordance with an agreement between the parties in **Preisler I** made on January 25, 1966, in order that the 1966 elections would not be confused by the uncertainty of possible Court decisions while the elections were in progress. The Court had retained jurisdiction and Plaintiffs had filed a motion for a declaration and injunction. The District Court, therefore, did not need to rule on the question of the conduct of the 1966 elections by the districts of the 1965 Act because that question was not before it after the agreed voluntary dismissal without prejudice. The jurisdiction of the District Court to hear and determine the instant case was not questioned at any time. Cases before courts in various states have uniformly deferred action during and shortly before an electoral process in progress.

ARGUMENT.

The questions presented by Appellants in their "Jurisdictional Statement" are unsubstantial.

The opinion, decision, and judgment of the three-judge District Court being appealed from (cited on pages 16 through 79 of Appellants' "Jurisdictional Statement") extensively and adequately present the principles involved in the cases which have adjudicated the constitutionality of congressional representative districting acts of the several states and, in the instant case **(Preisler II)**, the District Court reaches the appropriate determination and disposition of the instant action concerning the congressional representative districts of the State of Missouri. Appellees agree with the findings of fact, opinion, decision, and judgment of the District Court. The distinctions drawn and the interpretations made by Appellants (in their "Questions Presented", pages 2 and 3, paragraphs 1, 2 and 3 of their "Jurisdictional Statement") by which Appellants seek to counteract the impact of the several cases cited by the District Court are unsubstantial, as the opinion of the District Court reveals (cited on pages 38 through 64 and footnotes thereto, in Appellants' "Jurisdictional Statement").

In seeking guidance from the decided cases for determining how great a difference or variance between districts constitutes a violation of the constitutional requirements, one must be aware of and draw careful distinction between variances allowed by courts in cases on congressional representative districting under the provisions of **Article I, Section 2, of the United States Constitution**, and the variances allowed in cases on the apportioning of the houses of a state legislature under the provisions of the **Fourteenth Amendment to the United States Constitution.** The Fourteenth Amendment cases were decided against a background of the judicial interpretation of

the equal protection clause standard of "invidious discrimination", which standard was developed from cases on a variety of non-electoral subjects. Thus Mr. Justice Douglas, concurring in **Baker v. Carr**, 369 U. S. 186, at page 245, and Mr. Justice Clark, concurring in the same case, at page 253, referred to the applicable equal protection standard of the Fourteenth Amendment in terms of "invidious discrimination", as set forth in the cases cited in these concurring opinions. **Article I, Section 2** is free of any previous judicial interpretation or construction, and a much lower variance of district populations constitutes a violation of the individual citizen's rights under this section than under the amendment.

This Court in **Wesberry v. Sanders**, 376 U. S. 1 (1964), construed **Article I, Section 2 of the United States Constitution** in part, at page 7, saying:

> "We hold that, construed in its historical context, the command of Article I, Section 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."

and in concluding its opinion, at page 18, the Court said:

> "While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our **Constitution's plain objective of making equal representation for equal numbers of people** the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us." (Emphasis supplied.)

Population equality of the districts is, therefore, the only permissible basis for congressional representative districting.

This Court in **Reynolds v. Sims**, 377 U. S. 533 (1964), in comparing apportioning of state legislatures with congressional representative districting, at page 577, said:

> "In **Wesberry v. Sanders**, *supra*, the Court stated that congressional representation must be based on population as nearly equal in population as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in **Wesberry**—equality of population among districts—some distinctions may well be made between congressional and state legislative representation . . . Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting."

Regardless of the words used to describe the permissible population variances between congressional districts, whether described as "as nearly equal as may be", "as nearly equal as practicable", "substantially equal", or "equal representation for equal numbers of people", the maximum population variance between districts in Missouri of 84,655 and the many variances nearly as great, 80,659, 79,648, 75,652, 72,082 and others (cited in **Table II** on page 27 of Appellants' "Jurisdictional Statement") are constitutionally not permissible in a state wherein low population political areas (such as precincts, wards, townships, and even counties) exist throughout the state which make population adjustments between districts a relatively simple matter. By any standard of equality of population, such variances between congressional representative districts are unconstitutional. Any claims, as advanced by Appellants, that such variances are permissible, are unsubstantial.

Appellants claim (in their "Jurisdictional Statement" in "Questions Presented", page 3, ¶ 4) that the District

Court found that there is an overvaluation and overweight of votes in the rural geographic areas as contrasted with the votes in metropolitan areas in the composition of congressional districts. Appellants claim that this conclusion of the Court is based, to some extent, on inaccuracies in certain facts stated and comparison of dissimilar fact situation.

The geographic location of the districts, whose population differences with other districts create unconstitutional disparities in the relative value and influence of the vote of the individual voters residing in different districts, is of no legal significance, hence the geographical location of a district presents an unsubstantial question.

Appellants draw attention to the District Court's inaccuracies in the statements of some facts (pages 3, 4, and 12 of their "Jurisdictional Statement"). The mistakes of the District Court are of little import. For example, it is obvoius that the Court was referring to the relative loss in population rather than to the change in population which was an increase, because the Court was merely indicating that the number of districts was reduced from eleven to ten (page 12). Again, in comparing the districting of Maryland with that of Missouri (page 12), the Court was comparing states with about the same number of districts, eight and ten, presenting a somewhat similar situation; the comparison for the purpose made is valid whether or not the population of Missouri was accurately stated. The Court may have been inaccurately stating some populations, obviously through the inadvertent transposition of some numbers, but such discrepancies are of no significance to the discusison of the particular points in question.

Appellees contend that, if Appellants considered that the inaccuracies of the District Court complained of by Appellants were of such magnitude that the inaccuracies

might have even remotely affected the conclusions of the Court or that the Court may have based its conclusions on such or other inaccurate data, Appellants could have and should have brought their claims to the District Court through a motion for a rehearing of the cause before the District Court.

No official records are taken by either house of the General Assembly (the Legislature) of Missouri of the debates or discussions presented on the floor nor are any records taken of the debates or discussions before any committees. Therefore, whether population was the principal factor considered by the Legislature, as Appellants claim (in their "Questions Presented", page 4, ¶5) cannot be ascertained or determined. The constitutionality of the 1965 Congressional Districting Act must be judged on its face alone and on the populations of the districts which it created.

The maximum variation of population of 84,655 (between the First and the Tenth districts) and other gross and excessive differences (cited in **Table II** on page 27 of Appellants' Jurisdictional Statement) of 80,659, 79,648, 75,652, 72,082, and many other lesser variances but still far from meeting acceptable standards, support the conclusion that the Legislature made an ineffective attempt to make the district populations equal so that the vote of the voter in one district would have an equal weight and influence equal to the vote of the voter in the other districts. The claim of Appellants that substantial equality in population of the districts has been attained is unsubstantial, in view of the gross and excessive differences in the district populations (cited in **Table II**).

There is no inaccuracy or doubt possible concerning the gross and excessive population differences of 84,655, 80,659, 79,648, 75,652, 72,082 and many others (Table II). These variances between the populations of the districts

created by the 1965 Congressional Representative Redistricting Act of Missouri are clearly unconstitutional under **Article I, Section 2, of the United States Constitution** as construed by this Court in **Wesberry v. Sanders**, 374 U. S. 1.

Political stability, as suggested by Appellants, cannot be considered in determining that unconstitutional districts be retained in effect, nor can any other factor than district population equality be the criterion upon which the validity of the districting Act is judged.

The General Assembly of Missouri, which was elected in November 1966 from newly apportioned districts, will be convened early in January 1967 to adjourn on June 30, 1967. An early consideration and disposition by this Court of this motion to affirm the judgment and decree of the District Court could be of assistance to the General Assembly in its procedures and considerations of the issues herein involved.

Appellees pray the Court to affirm the judgment sought to be reviewed on appeal on the ground that it is manifest that the questions presented are so unsubstantial as not to need further argument.

Respectfully submitted,

PAUL W. PREISLER,
4274 Shenandoah Avenue,
Saint Louis, Missouri 63110,
Attorney for Appellees.

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NO. 738

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court
For the Western District of Missouri
Central Division.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

NORMAN H. ANDERSON
Attorney General of Missouri

J. GORDON SIDDENS
Assistant Attorney General

THOMAS J. DOWNEY
Assistant Attorney General
Box 899
Supreme Court Building
Jefferson City, Missouri
Attorneys for Appellants.

KELLY PRESS, INC., 201 South Eighth Street, Columbia, Missouri

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APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO AFFIRM.

PRELIMINARY STATEMENT.

The opinion and decision of the lower court which is the subject matter of this Appeal is now reported as Preisler v. Secretary of State, 257 F. Supp. 953.

Appellants' Jurisdictional Statement set forth a Statement of the Case as required by Rule 15 of this Court. This statement constituted a good faith effort by appellants to present a concise recitation of the facts material to a consideration of the questions presented by the appeal.

The Motion to Affirm filed by appellees adopts appellants' Statement of the Case with purported additions and corrections. An examination of these additions and corrections reflects that appellees have drawn conclusions which they contend are based upon the facts. New facts are recited in the Statement of the Case by appellees. Therefore, appellees' Statement of the Case should be considered by the court as argument rather than as additions and corrections to the facts.

ARGUMENT.

Appellants' Jurisdictional Statement sets forth five questions presented by this appeal. These questions are discussed by appellants under three separate categories for the purpose of demonstrating to the court that the questions are substantial and support the exercise of jurisdiction by this court. Appellees' Motion to Affirm on the ground that the questions presented by the appeal are so unsubstantial as to not need further argument chooses to completely ignore several of the questions presented.

It shall be appellants' intention in this argument to avoid repetition of the discussion in support of jurisdiction on file in appellants' Jurisdictional Statement.

1.

The first question presented by appellants contends that the opinion of the lower court is in conflict with **Wesberry v. Sanders**, 376 U.S. 1, as supplemented and complemented by **Reynolds v. Sims**, 377 U.S. 533. This question is stated on pages 2 and 3 and discussed on pages 7, 8 and 9 of the Jurisdictional Statement. Appellants contend that the court was in error in rejecting the principles stated in Reynolds v. Sims as wholly inapplicable to the validity of congressional districts.

As a result of its total rejection of **Reynolds v. Sims** as inapplicable to the congressional districts under consideration in this case, the lower court found that population is the **sole factor** for legislative consideration in establishing congressional districts and that districts in excess of **de minimis** population deviations are invalid under Article I, Section 2 of the United States Constitution. Appellees are content to rely upon the opinion of the lower court without any discussion of this question. Appellees at no time advance argument that the question is unsubstantial.

Appellants reiterate the position advanced in their Jurisdictional Statement that the overwhelming public interest requires a resolution of this question.

2.

The second question presented by appellants contends that the opinion and decision of the lower court is in conflict with numerous prior decisions of United States District Courts in other jurisdictions. The question is stated on page 2 and discussed on pages 9, 10, 11 and 12 of the Jurisdictional Statement.

Appellees have chosen to completely ignore a discussion of this question. No remote reference to the question can be found either expressly or impliedly in the Motion to Affirm.

The substantiality of this question is closely related to the first question. Other United States District Courts have consistently applied the principles of **Reynolds v. Sims** in congressional reapportionment cases in recognition that these principles supplement and complement **Wesberry v. Sanders.**

The question of the conflict expressly declared by the lower court with the decisions of other United States District Courts is substantial because it is clear that if the lower court had been in harmony with the decisions of other courts its judgment would have been inescapable that congressional districts in the State of Missouri were constitutionally valid. Congressional districts in Indiana were declared valid in **Grills v. Branigin,** 255 F. Supp. 155, and appellants have pointed out in their Jurisdictional Statement, page 10 and 11, that the population variations in the Indiana districts, together with the relative significance of such variations stated in mathematical terms is almost identical to the factual situation existing in Missouri congressional districts. We have been informed that the Indiana

case is pending on appeal by the plaintiffs to this court, **Duddleston, et al. v. Branigin, et al.**, Case No. 370, October Term, 1966. An examination of **Bush v. Martin**, 251 F. Supp. 484, and **Kirby v. Illinois State Electoral Board**, 271 F. Supp. 909, reflects that congressional districts have been found to be valid in the states of Texas and Illinois in which the factual situation is almost identical with the factual situation in Missouri. It is significant that the United States District Court for the Northern District of Illinois participated in establishing the congressional districts referred to in that state.

Appellants have not inferred a conflict by the lower court with the decisions of other United States District Courts. The lower court's opinion is set forth in its entirety in the Jurisdictional Statement, and the court's express conflict and disagreement with **Bush v. Martin**, supra, **Grills v. Branigin**, supra, and **Moore v. Moore**, S.D. Ala. (1965), 246 F. Supp. 578, is stated on page 59. The court's disagreement with **Kirby v. Illinois State Electoral Board**, supra, and **Levitt v. Maynard**, 105 N.H. 447, 202 A.2d 478 (1964), is recited in footnote 19 on page 72.

Therefore, the conflict by the lower court with numerous other United States District Courts presents a question which is substantial because it affects the validity of the Congressional Redistricting Act in Missouri which is under consideration and it also creates uncertainty throughout the United States in regard to the constitutional validity of congressional districts. Appellees' complete silence concerning this question implies acquiescence on their part that the question is substantial.

3.

The third question presented by appellants contends that the opinion and decision of the lower court misconstrued the opinions and decisions of other United States District

Courts in concluding that population is the sole factor for legislative consideration in establishing congressional districts. The question is set forth on page 3 and discussed on page 11 of the Jurisdictional Statement. This question is closely related to the first question.

The lower court has held that population is the **sole factor** for legislative consideration in establishing congressional districts and that the only constitutionally permissible population deviations in congressional districts are **de minimis** population variations. In reaching this conclusion the Court had declared that it is supported by **Calkins v. Hare**, 228 F. Supp. 824, **Drum v. Seawell**, 250 F. Supp. 922, and **Maryland Citizens' Committee v. Tawes**, 253 F. Supp. 731. Appellants contend that the court misconstrued the cited case, the Jurisdictional Statement has discussed the substantiality of this question, and it stands uncontradicted by appellees.

4.

The fourth question presented by appellants contends that erroneous conclusions are made by the lower court in regard to the overvaluation and overweight of votes in the rural areas and that in other respects there are inaccuracies in certain facts stated, together with odious and invidious comparisons of dissimilar fact situations. The question is stated on pages 3 and 4 and discussed on pages 12, 13 and 14 of the Jurisdictional Statement.

Appellees dispose of the question concerning these erroneous conclusions, factual inaccuracies and baseless comparisons by stating that the geographic location of districts is of no legal significance and hence does not present a substantial question; that the factual mistakes of the District Court are of little import, and that factual discrepancies are of no significance in the comparisons made.